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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1962

No. ~~66-5~~ 51

CITY OF FRESNO,

Petitioner,

vs.

STATE OF CALIFORNIA, UNITED STATES
OF AMERICA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Respondents.

PETITION FOR A WRIT OF CERTIORARI

**to the United States Court of Appeals
for the Ninth Circuit**

The City of Fresno petitions for a Writ of Certiorari to review the judgment entered on March 31, 1961, by the United States Court of Appeals for the Ninth Circuit, as amended and explained by supplemental judgment entered by said Court on the 14th day of August, 1961.

OPINIONS BELOW

1. Opinions in the District Court.

The opinion and supplemental opinion of the District Court are reported as *Rank v. (Krug) United States* in 142 F.Supp. 1 to 198.

The same District Court rendered an earlier companion opinion, *Rank v. Krug*, 90 F.Supp. 773 (1950), on appellants' motion to strike covering many of the issues in *Rank v. (Krug) United States*, 142 F.Supp. 1 to 198 (1956). This earlier decision of the District Court is cited repeatedly by the District Court in its opinion in *Rank v. (Krug) United States*, 142 F.Supp. 1 to 198 and is cited with approval by this Court in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 754,¹ 70 S.Ct. 955, 970, 94 L.Ed. 1231 (1950).

2. Opinions in the Court of Appeals.

The opinion of the Court of Appeals dated and entered March 31, 1961, as amended and explained by opinions of the Court of Appeals dated and entered August 14, 1961, has not as yet been reported and is printed in the Appendix infra, pages 1 and 48.

The Court of Appeals, on August 14, 1961, denied the petition of the City of Fresno for a rehearing and granted the petition for rehearing of the appellant,

¹"22. United States District Court, Southern District of California rendered a decision on April 12, 1950, in *Rank v. Krug*, 90 F. Supp. 773, consistent with the views we take of the issues here involved."

United States v. Gerlach Live Stock Co., 339 U.S. 725, 754, 70 S.Ct. 955, 970, 94 L.Ed. 1231 (1950).

State of California, and of certain appellant irrigation districts, but the Court of Appeals has as yet made no final determination on the rehearings so granted.

As stated in the Petition for Writ of Certiorari hereinbefore filed by the Solicitor General of the United States to review said decision of said Ninth Circuit Court of Appeals, entered March 31, 1961, as amended by decision of said Court entered August 14, 1961, (No. 366 in the Fall term, 1961, of this Court), due to the fact that the Court of Appeals has not made a final decision after granting the petitions for rehearing, the United States may ask to amend its Petition for Writ of Certiorari. Likewise, petitioner herein, the City of Fresno, may request to amend its Petition for Writ of Certiorari on the same ground, in the event the Court below modifies its said decisions.

II

JURISDICTION

The date of the judgment of the Circuit Court of Appeals for the Ninth Circuit sought to be reviewed and the date of its entry is March 31, 1961. This judgment is unreported but is set out in full at page 46 of the Appendix to this petition. This judgment of the Court below was amended by judgment dated and entered August 14, 1961, page 48 Appendix to this petition.

The United States was a party defendant in the District Court. The Court of Appeals dismissed the

United States as a defendant but in general sustained the District Court against the appellant Bureau of Reclamation officials. The appellant Bureau of Reclamation officials did not ask a rehearing in the Court of Appeals. By order of Mr. Justice Douglas of June 16, 1961, the time for filing a Petition for Writ of Certiorari by the appellant Bureau of Reclamation officials was extended to August 28, 1961.

On the 28th day of August, 1961, the appellant Bureau of Reclamation officials filed a Petition for Writ of Certiorari in this Court for a review of said opinion of the Ninth Circuit Court entered March 31, 1961, as amended by opinion of said Court entered August 14, 1961, which Petition for Writ of Certiorari is numbered No. 366 in the Fall term, 1961 of this Court.

The Petition of the City of Fresno, petitioner herein, for rehearing in the Court of Appeals was denied by the Court of Appeals on August 14, 1961. By order of Mr. Justice Douglas dated November 3, 1961, the time for the City of Fresno, petitioner herein, to file a Petition for Writ of Certiorari was extended to and including December 12, 1961.

The jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

The basis for jurisdiction of the District Court was 28 U.S.C. 1442 (a) (3).

III

QUESTIONS PRESENTED FOR REVIEW

1. Whether the rate charged for water by the appellant Bureau of Reclamation officials from the Central Valley Project to petitioner, the City of Fresno, is unreasonable or reasonable is an administrative determination as ruled by the Court of Appeals or is a judicial determination as ruled by the District Court and particularly, whether the decision of the District Court that any charge to petitioner, the City of Fresno, for water in excess of \$3.50 per acre-foot was unreasonable, was a judicial determination which should have been affirmed by the Court below.

2. Whether the determination of the limits of the authority of the administrative officers of the United States Bureau of Reclamation, as set by Congress, is an administrative determination as ruled by the Court below or is a judicial determination as ruled by the District Court and particularly, whether Congress, in authorizing the Central Valley Project for California, and providing water from said project for municipal and agricultural uses in six counties of California, namely Merced, Madera, Fresno, Tulare, Kings and Kern Counties, authorized the appellant Bureau officials to arbitrarily refuse, as an administrative determination, to sell badly needed water to the petitioner herein, the City of Fresno, where the city and county are admittedly in the service area of the Central Valley Project and were and are in an area of admittedly deficient water supply.

3. Whether, where the Basic Reclamation Act of June 17, 1902 (32 Stat. 388; 43 U.S.C. 391 et seq.) requires the Bureau of Reclamation to proceed in conformity to state laws relating to the control, appropriation, use or distribution of water including the laws of the State of California specifically requiring that no water may be exported by the Bureau of Reclamation from a California county or watershed in which water originates until a sufficient supply is reserved to meet the needs of such county and watershed of origin, and where Congress by specific legislation (63 Stat. 852, 853) has required the appellant Bureau of Reclamation officials to reserve sufficient water to satisfy the requirements of California counties and watersheds in which water originates in its operation of the Central Valley Project, before it is exported out of said counties and watersheds of origin elsewhere, the appellant Bureau of Reclamation officials can take percolating underground waters of the City of Fresno located in the county and watershed of origin of said waters, by condemnation or eminent domain for agricultural use in areas outside the county and watershed of origin.

4. Whether appellant can raise questions for the first time in their appeal briefs or in petitions for rehearing that were not designated in their designation of points on appeal as required by Rule 75(d) Federal Rules of Civil Procedure (28 U.S.C. 75(d)) and particularly whether appellant Bureau of Reclamation officials can raise for the first time the question of the validity of the District Court's decision that

any charge of the appellant Bureau of Reclamation officials in excess of \$3.50 per acre-foot for municipal water from the Central Valley Project to petitioner, the City of Fresno, was unreasonable where no such point was set forth in appellant Bureau of Reclamation officials' designation of points on appeal, and where the Court below did find that the District Court's determination that any charge to petitioner, the City of Fresno, in excess of \$3.50 per acre-foot for water was unreasonable was not sustained by the evidence.

5. Whether the Court of Appeals properly dismissed the United States as a party defendant after it had been joined as a defendant in this suit by the District Court under the Act of July 10, 1952 (66 Stat. 518, 560, Sec. 208 (a)).

6. Whether an appellant who has intervened in a case and asked for affirmative relief, can for the first time on a motion for rehearing after decision by a Court of Appeals, and without designating such right to a dismissal in its designation of points on appeal under Rule 75 (d), Federal Rules of Civil Procedure (28 U.S.C. 75 (d)), or in its appeal brief for the first time ask that it be dismissed from the action without costs.

IV

**THE CONSTITUTIONAL PROVISIONS AND
STATUTES AND REGULATIONS**

1. *Acts of Congress.*

- (a) Act of December 5, 1924 (43 Stat. 672, 702; Section 4, Subsection B)
- (b) Act of June 17, 1902 (32 Stat. 388; 43 U.S.C. 391 et seq.)
- (c) Act of August 26, 1937 (50 Stat. 844)
- (d) Reauthorization Act of October 13, 1949 (63 Stat. 852, 853)
- (e) Act of July 10, 1952 (66 Stat. 518, 560, Sec. 208, Subsection (a))
- (f) Federal Rules of Civil Procedure (28 U.S.C.) Rule 75 (d)
- (g) Federal Rules of Civil Procedure (28 U.S.C.) Rule 75(i)
- (h) 28 U.S.C. 1254 (l)
- (i) 28 U.S.C. 1442 (a) (3)

2. *Federal Regulations.*

- (a) Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935. (Issued in accordance with the Act of December 5, 1924 (43 Stat. 672, 702, Section 4, Subsection B), see Appendix, page 53, *infra*.)

3. *State of California Constitution and Statutes.*

- (a) California Constitution, Article XIV, Sec. 3.
- (b) California Water Code Sections: 104, 106, 1254, 1460, 10500, 10504, 10505, 11128, 11460, 11463.

STATEMENT

This case involves the United States Bureau of Reclamation's Central Valley Project in California and the efforts of petitioner, the City of Fresno, to protect and enforce its rights to water from the Central Valley Project specifically granted to it by the Congress of the United States under that project.

1. History of Present Litigation.

This case involves the efforts of the City of Fresno, California, and a group of farmers owning riparian and percolating water rights along a thirty-eight mile stretch of the San Joaquin River between Friant Dam and Gravelly Ford Canal in Fresno and Madera Counties, California, to obtain the water to which they are entitled out of the United States Bureau of Reclamation's Central Valley Project in California.

Among other defendants in the District Court were the United States, the defendant Bureau of Reclamation officials and some fifteen irrigation districts supplied with San Joaquin River water out of the Central Valley Project.

The District Court granted the farmers an injunctive judgment by decreeing what is known in California as a "physical solution".² This decree of physical solution ordered the appellant Bureau of Reclamation officials either to allow the full natural flow of the San Joaquin River below Friant Dam or in the alterna-

²*City of Lodi v. East Bay Municipal Utility District*, 7 Cal. 2d 316, 345, 60 P. 2d 439, 452 (1936).

tive, to reduce the flow to a minimum and to supply the farmers riparian and percolating water rights by construction of ten check dams in the thirty-eight mile stretch of the San Joaquin River in order to pond the water in the River and give the farmers a substitute riparian and percolating water supply in place of what they had before the appellant Bureau of Reclamation diverted most of the natural flow of the San Joaquin River past their lands by means of Friant Dam and the Madera and Friant-Kern Canals of the Central Valley Project. The Court below sustained the District Court's plan of physical solution and held that these riparian and underground percolating water rights of these farmers had not been taken by eminent domain.

The City of Fresno is in the county and watershed of the San Joaquin River and obtains its water supply partly from wells pumping from underground percolating waters seeping from the San Joaquin River below Friant Dam.

The District Court decreed that the City of Fresno had overlying percolating water rights to water seeping from the San Joaquin River. The District Court also held that the City needed and was entitled to a supplemental supply of surface water out of the Bureau of Reclamation's Central Valley Project at a rate not to exceed \$3.50 per acre-foot and that the appellant Bureau of Reclamation officials' charge of \$10.00 per acre-foot for water out of the Central Valley Project was unreasonable.

The Court below sustained the District Court's finding that the City of Fresno had underground percolating water rights but ruled that these rights of the City of Fresno could be taken by the appellant Bureau of Reclamation officials by eminent domain or condemnation. The Court below also reversed the District Court's ruling that the City of Fresno was entitled to a supplemental supply of water out of the Central Valley Project at not to exceed \$3.50 per acre-foot, holding that the determination of whether the City of Fresno was in the service area of the Central Valley Project as provided by Congress was an administrative and not a judicial decision and that the determination of whether a rate for water in excess of \$3.50 per acre-foot was reasonable or unreasonable was also an administrative and not a judicial decision and that the fixing of rates for water out of the Central Valley Project was beyond the power of the Courts to control. The Court below also dismissed the suit as against the United States but sustained the action against the appellant Bureau of Reclamation officials.

The City of Fresno though agreeing with many parts of the opinion of the Court below, however, now petitions this Court for a Writ of Certiorari directed to the Circuit Court of Appeals to review the decree of the Court below on the above important points.

The appellant Bureau of Reclamation officials have already filed a petition for Writ of Certiorari with this Court to review the decision of the Court below. (No. 366, October Term, 1961.)

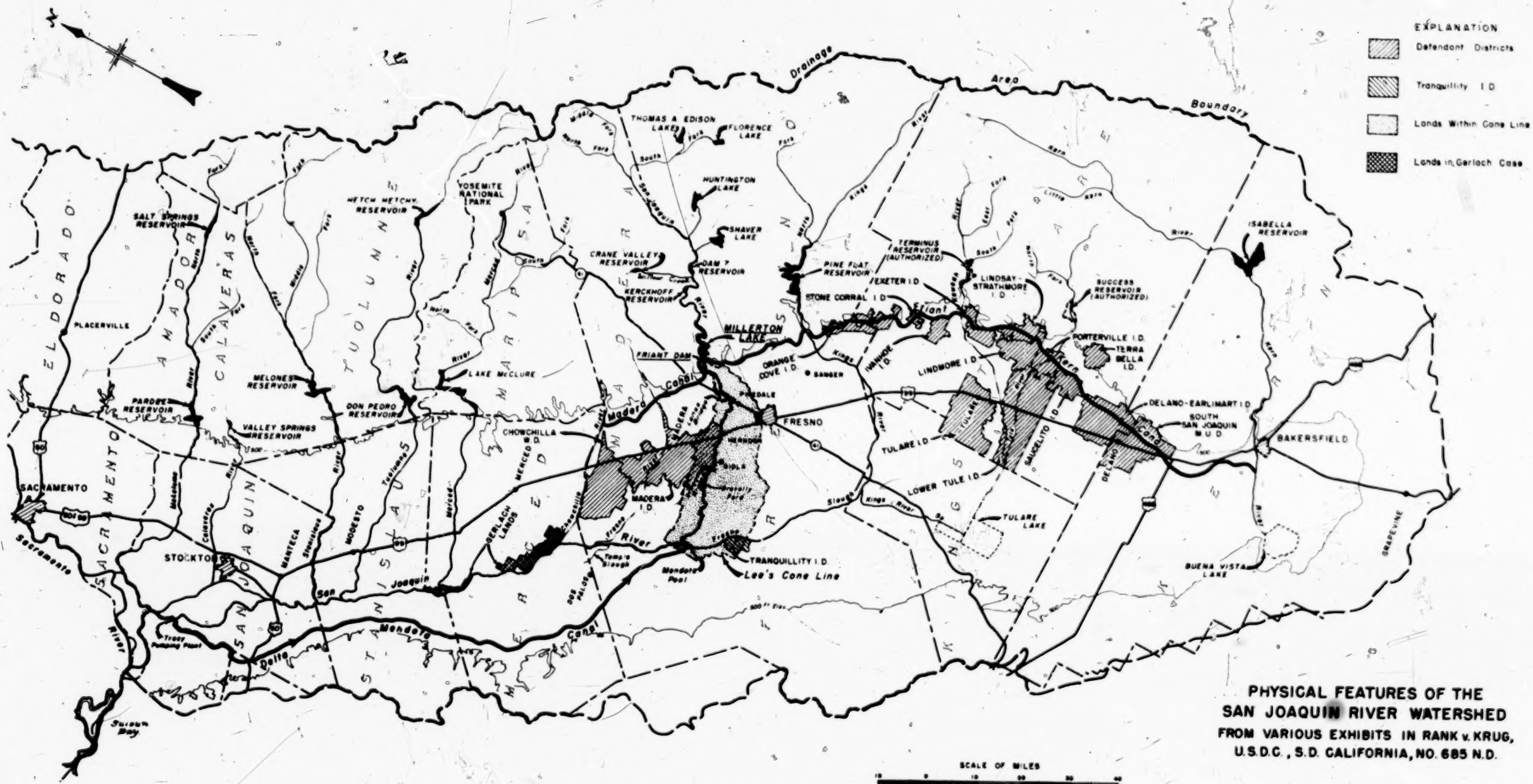
2. Location of the Central Valley Project and the Lands of the Litigants.

At pages 39, 40 and 41 of *Rank v. Krug*, 142 F. Supp. 1, there is an excellent map showing the main features of the Central Valley Project in the area involved in this litigation including Friant Dam, the Delta-Mendota Canal, the Friant-Kern Canal, the Madera-Kern Canal, the areas of percolating water supplied by the San Joaquin River referred to on said map as "Lee's Cone Line", the City of Fresno, the lands of the original plaintiffs, and the lands of all of the defendant irrigation districts in the present action. *This map is reprinted for the convenience of this Court on the page opposite.*

3. The Central Valley Project.

The Bureau of Reclamation's Central Valley Project in California has been described in the decisions of this Court in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, in *Rank v. (Krug) United States*, 142 F.Supp. 1, and in *Rank v. Krug*, 90 F.Supp. 773, cited with approval by this Court in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

As this Court stated in its two opinions, *supra*, the Central Valley of California is a valley 400 miles long and 100 miles wide. The northern portion of the valley has an excess of rainfall and is drained by the Sacramento River. The southern portion of the valley which includes the City and County of Fresno, is arid, lacks water and is drained by the San Joaquin River.



As also stated by this Court, the Central Valley Project "is a gigantic undertaking to *redistribute* principal fresh water resources of California".³

The Central Valley Project has several added incidental features such as Folsom Dam on the American River and Trinity Dam on the Trinity River of California. However, briefly stated the primary purpose of the Central Valley Project as authorized by Congress was, and still is, a project to take water from the water-rich northern part of the Central Valley of California and redistribute it to existing municipalities and counties in the southern portion of the Central Valley, including the City of Fresno, and to furnish a supplemental irrigation water supply to the following six counties in the San Joaquin Valley, namely, Merced County, Madera County, *Fresno County*, Tulare County, Kings County and Kern County.

³*United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728, 70 S.Ct. 955, 94 L.Ed. 1231 (1950).

4. Legislative History of the Central Valley Project.

Section 4 of the Act of Congress of December 5, 1924 (43 Stat. 672, 702, Sec. 4 (B)), provides that no irrigation project should be constructed under the Basic Reclamation Act of June 17, 1902 (32 Stat. 388) until the reclamation project had been set forth in detail.

"That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes and that it will probably return the cost thereof to the United States."

Act of December 5, 1924 (43 Stat. 672, 702, Section 4, Subsection B).

Pursuant to said Act of December 5, 1924, hereinabove referred to, Secretary Ickes submitted to President Roosevelt the Feasibility Report on the Central Valley Project and on December 2, 1935, President Roosevelt officially approved the same, thereby determining the basic features of the Central Valley Project.

That the Feasibility Report by the President dated December 2, 1935, is the basis and continued to be the basis of the Central Valley Project as authorized and reauthorized by Congress, appears from the decision

of this Court in *United States v. Gerlach Live Stock Co.*, *supra*.⁴

The Feasibility Report specifically provided that the water from Friant Dam, one of the principal features of the Central Valley Project, was to serve "*developed, irrigated lands*" in the counties of Merced, Madera, Fresno, Tulare, Kings and Kern, including the City of Fresno.⁵

The Feasibility Report also specifically provided that the Central Valley Project was to furnish a supplemental water supply for "*existing municipal de-*

"But it also is true, as pointed out by the claimants, that in these Acts Congress expressly 'reauthorized' a project already initiated by President Roosevelt who, on September 10, 1935, made allotment of funds for construction of Friant Dam and canals under the Federal Emergency Relief Appropriation Act, 49 Stat. 115, 118, Section 4, and provided that they 'shall be reimbursable in accordance with the reclamation laws'. A finding of feasibility, as required by law was made by the Secretary of the Interior on November 26, 1935, making no reference to navigation, and his recommendation of 'the Central Valley development as a Federal reclamation project' was approved by the President on December 2, 1935."

United States v. Gerlach Live Stock Co., 339 U.S. 725, 70 S.Ct. 955, 958-959, 94 L.Ed. 1231 (1950).

"Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve *developed irrigated lands* in an area extending from Madera County on the north to Kern County on the south." (Emphasis ours.)

Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935.

"Prior to December 2, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land non-riparian to the river, situated both to the north and south of Friant in the counties of *Madera, Merced, Fresno, Tulare, Kings and Kern* in the State of California." (Emphasis ours.)

Gerlach Live Stock Co. v. United States, 111 Ct.Cls. 1 at 27, Aff. 339 U.S. 725 (1950), 70 S.Ct. 955, 94 L.Ed. 1231.

velopments"⁶ which, of course, would include the petitioner, the City of Fresno.⁷

And finally, and what is most important, *the Central Valley Project was not designed to bring new lands into cultivation.*

"The project is not designed for bringing new lands into cultivation, but for the maintenance of existing agricultural development and existing civilization of high type." (Emphasis ours.)

Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935.

After the determination of the limits of Central Valley Project on December 2, 1935, by President

"The Central Valley Project embodies a plan . . . to provide urgently needed water supplied for *existing* . . . municipal developments in the Sacramento and San Joaquin Valleys and upper San Francisco Bay Region . . ." (Emphasis ours.)

Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt December 2, 1935.

"The Central Valley basin development . . . includes . . . water . . . for *municipal* and miscellaneous purposes including *cities* . . ." (Emphasis ours.)

United States v. Gerlach Live Stock Co., 339 U.S. 725, 733, 70 S.Ct. 955 (1950), 94 L.Ed. 1231.

"The object of the plan is to arrest the flow and regulate its seasonal and year to year variations thereby creating salinity control to avoid the gradual encroachment of ocean water, providing an adequate supply . . . for *municipal* and irrigation purposes." (Emphasis ours.)

Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 78 S.Ct. 1174 (1958), 2 L.Ed. 2d 1313.

"Both the City of Fresno and the Fresno Irrigation District are, and always have been, since the formation of general plans for the Central Valley Project, fairly within the service area of the Central Valley Project."

State Water Rights Board of the State of California, Decision No. D 935, Adopted June 2, 1959, p. 68.

Roosevelt, Congress as stated thereafter specifically provided that the Central Valley Project should be *constructed and operated* in accordance with the Basic Reclamation Law of June 17, 1902⁸ (originally signed by President Theodore "Teddy" Roosevelt) (43 U.S.C. 391, 411), which specifically provides that in the construction and operation by the Bureau of Reclamation, *all* state laws on waters must be obeyed and all existing *water rights must be respected* and protected by the government officials.⁹

⁸Act of August 26, 1937 (50 Stat. 844, 850), page 62 Appendix, *infra*.

"A finding of feasibility, as required by law was made by the Secretary of the Interior on November 26, 1935, making no reference to navigation, and his recommendation of 'the Central Valley development as a Federal reclamation project' was approved by the President on December 2, 1935."

United States v. Gerlach Live Stock Co., 339 U.S. 725, 70 S.Ct. 955, 958-959, 94 L.Ed. 1231 (1950).

⁹"Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the *Secretary of the Interior*, in carrying out the provisions of this Act, shall proceed in conformity with such laws. • • •" (Emphasis ours.)

Act of June 17, 1902 (32 Stat. 388, 390, 43 U.S.C. 391).

"Sec. 8 of the Reclamation Act, 43 U.S.C.A. 383, 392, provided: 'That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation or any vested right acquired thereunder and the *Secretary of the Interior* in carrying out the provisions of this Act shall proceed in conformity with such laws' • • •"

"We have then a direction by Congress to the Secretary of the Interior to proceed in conformity with state laws in appropriating water for irrigation purposes." (Emphasis ours.)

State of Nebraska v. State of Wyoming, 325 U.S. 589, 612, 65 S.Ct. 1332, 1348.

California law specifically provides *that the State of California shall determine what water of the state can be converted to public use and that domestic use of water is the highest use of water in the state.* California Water Code Sections 104, 106, 1254, Appendix pages 66 and 69.

California law also specifically provides that no water should be taken from the county and watershed where such water originates until the needs of such county and watershed of origin have been fully supplied, (California Water Code Section 11460, Appendix page 66) and that these limitations shall apply to the Federal Government in its operation of the Central Valley Project, (California Water Code Section 11128, Appendix page 68, *infra*) and finally Congress itself specifically provided that in the operation of the Central Valley Project that the Bureau of Reclamation should recognize and follow all California county of origin and watershed or origin laws not only for their present but their future needs.

“BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, . . .

“ . . . the Secretary of the Interior shall make recommendations for the *use of water in accord with State water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future needs.*”
(Emphasis ours.)

Reauthorization Act of October 13, 1949 (63 Stat. 852, 853), Appendix page 64, *infra*.

Friant Dam was completed (with the exception of some drum gates not included in the original plans) and placed in actual operation on August 4, 1944. At this time water was first turned into one of the main canals for use. The City of Fresno was looking forward to a supplemental supply of water out of Friant Dam at reasonable rates.

5. The Era of Boke and Strauss.

Everything was going fine with the construction and operation of the Central Valley Project under the same great engineers of the Bureau who had constructed Hoover Dam, Bonneville Dam and the other great reclamation projects. The City of Fresno was relying on the promises of these outstanding men and the acts of Congress guaranteeing them water from the Central Valley Project. Then shortly after the first water was delivered under the Central Valley Project in 1944, to the City's great dismay, two incompetent and inexperienced men, who were not engineers nor administrators, were installed as Chief of the Bureau of Reclamation and Regional Director of the Central Valley Project in California, and captured control of the great Bureau of Reclamation. These men, in violation of the original Feasibility Report covering the Central Valley Project and in violation of every act of Congress and the interpretations thereof by the federal courts, shortly after their appointment, began a consistent refusal to recognize the City of Fresno's rights to the water it was entitled to under the Central Valley Project as approved by Congress.

In our discussion of Boke and Strauss we are not attacking these men personally but simply want to point out that they were too inexperienced and unqualified to even begin to handle their respective jobs or to appreciate the magnificent group of engineers they headed, nor could they understand the will of Congress in regard to the Central Valley Project.

Immediately upon his employment as Chief of the Bureau of Reclamation, Strauss asked most of the great engineers of the Bureau of Reclamation, like Bashore who had constructed the Central Valley Project, and other great engineers of the Bureau of Reclamation, who had constructed Hoover and Bonnieville Dams, to get out.¹⁰

Boke, the Regional Director of the Bureau of Reclamation for California, was not an engineer and a Congressional committee found that he did not have the qualifications to administer the Central Valley Project.¹¹

¹⁰"Mr. Hodson. Yes; there has been a very quiet but nonetheless bitter controversy raging within the Bureau ever since . . . between the so-called old-time career Bureau people and on their ideas of what the Bureau is supposed to be doing, and the new group which has taken over control and management of the Bureau . . . Mr. Comstock talked to Mr. Bashore in Denver. He said that he was called into the office and given his choice to retire or be *kicked out*—so he retired—and the reasons were he would not go along on this new thinking and these new plans that the Bureau was putting into effect." (Emphasis ours.)

Investigation of the Bureau of Reclamation, Dept. of the Interior, in the Executive Depts. House of Representatives, 80th Congress, 2nd Session, page 746.

¹¹" . . . your committee has reached the conclusions, based on incontrovertible evidence, Mr. Boke does not possess the qualifications necessary to administer the gigantic Central Valley Project."

Investigation of the Bureau of Reclamation, Dept. of the Interior, in the Executive Depts., House of Representatives, 80th Congress, 2nd Session, page 10 (Aug. 4, 1948).

The old Bureau engineers who had successfully designed and constructed the Central Valley Project, Boulder Dam and the other great reclamation projects testified under oath that Strauss had completely wrecked the Bureau's great staff.¹²

Strauss, Chief of the Bureau of Reclamation, was equally criticized by Congress.¹³

While the City of Fresno was attempting to get the water to which it was entitled from the Central Valley Project under the acts of Congress, Strauss, himself, due to his continual violation of the mandates of Congress, admitted that Congress no longer trusted either him, Boke, nor the Secretary of the Interior.

¹² "Mr. Blanks. . . . Throughout the period of reclamation history, there has been built up the greatest engineering organization the world has known. It is world-renowned. It is something that the people of this country can well be proud of. It is something that all of us have been proud to be connected with. The engineering organization under the present administration of the Bureau of Reclamation has been wrecked, practically wrecked, . . ."

Investigation of the Bureau of Reclamation, Dept. of the Interior, before the Committee on Expenditures, in the Executive Depts., House of Representatives, 80th Congress, 2nd Session, page 699.

¹³ Referring to Mike Strauss, Chief of the Bureau of Reclamation over Boke: "Senator Downey: Mike Strauss: Succeeding Bashore, he stepped down from a higher position so that he could enforce his will more directly. As ignorant of engineering, irrigation, and western conditions as any man could be, with no important administrative experience behind his entry into the government service, Mr. Strauss represents the zealot, the politician, the ideologist who lives by the manipulation of propaganda, freely dispatched at public cost; who cares nothing for the truth except how best to obscure it."

Investigation of the Bureau of Reclamation, Dept. of the Interior, before the Committee on Expenditures, in the Executive Depts., House of Representatives, 80th Congress, 2nd Session, page 140.

“At the same Salt Lake City Conference (1947) Secretary Krug made the following statements: ‘This program is probably closer to my heart than any other in the Department of the Interior and as Mike (Michael Strauss, Commissioner of the Bureau of Reclamation) pointed out to you, for some strange reason: *people up in Congress don’t trust us like they used to.* * * *’ (Emphasis ours.)

Investigation of the Bureau of Reclamation,
19th Intermediate Report of the Committee
on Expenditures in the Executive Dept.
August 7, 1948, House Report No. 2458, pp.
555-556.

When Boke took over, he had an argument with some Fresno County officials. Thereafter he refused to act on any application from anyone in the County of Fresno, including the City of Fresno, for water from the Central Valley Project and illegally began the deliberate exclusion of the City of Fresno and the County of Fresno from any benefits from the Central Valley Project in direct violation of the will of Congress. The maps of the Bureau of Reclamation thereafter show the City and County of Fresno to be completely excluded from the Central Valley Project.

Acting under the illegal recommendations of Boke and Strauss the then Acting Secretary of the Interior Chapman, at the insistence of Boke and Strauss, illegally and without authority of Congress, blandly announced in a letter dated February 24, 1947 that he was taking from the San Joaquin River between

Friant Dam and Gravelly Ford Canal, a large portion of this vitally needed water from Fresno City and County, which water, under the original Feasibility Report of President Roosevelt, approved by Congress was only to be used as a supplemental supply, *to illegally supply an additional 338,000 acres of dry, uncultivated, and unirrigated land not intended to be supplied by water from the Central Valley Project under the original Feasibility Report nor by the acts of Congress authorizing and reauthorizing the project.*¹⁴

Boke thereafter negotiated and signed contracts with fifteen appellant irrigation and water districts¹⁵ in an abortive attempt to use up all of the water of the Central Valley Project and thus *illegally exclude the City and County of Fresno* from obtaining the

¹⁴"Millerton Lake will also provide 1,256,500 acre-feet (Class I and II) to the upper (southern) San Joaquin Valley as a supply for approximately 338,000 acres of presently dry land • • •" (Emphasis ours.)

Plaintiffs' Exhibit 136.

¹⁵ Districts	Date of Contract with Bureau
Delano-Earlimart	8/11/51
Exeter	11/ 8/50
Ivanhoe	9/23/50
Lindmore	2/29/49
Lindsay-Strathmore	8/ 5/48
Lower Tule	5/ 1/51
Orange Cove	5/20/49
Porterville	1/28/52
Saucelito	2/13/51
S.S.J.M.U.D.	10/18/45
Stone Corral	12/13/50
Terra Bella	10/12/50
Tulare	10/18/50
Chowchilla	7/ 5/50
Madera	5/14/51

Rank v. Krug, 142 F.Supp. 1, 137 (1956).

supply of vitally needed water to which they were entitled under the acts of Congress. We respectfully ask this Court to look at the official map of the Bureau of Reclamation on the page opposite, conclusively proving that the appellant officials of the Bureau of Reclamation intended to illegally exclude not only the petitioner, the City of Fresno, but the entire County of Fresno from participation in the Central Valley Project in spite of the ruling of the State of California agency in charge of appropriations of water¹⁶ and of this Court¹⁷ that Fresno County and petitioner, the City of Fresno, are in the service area of this project as defined by Congress.

6. The City of Fresno.

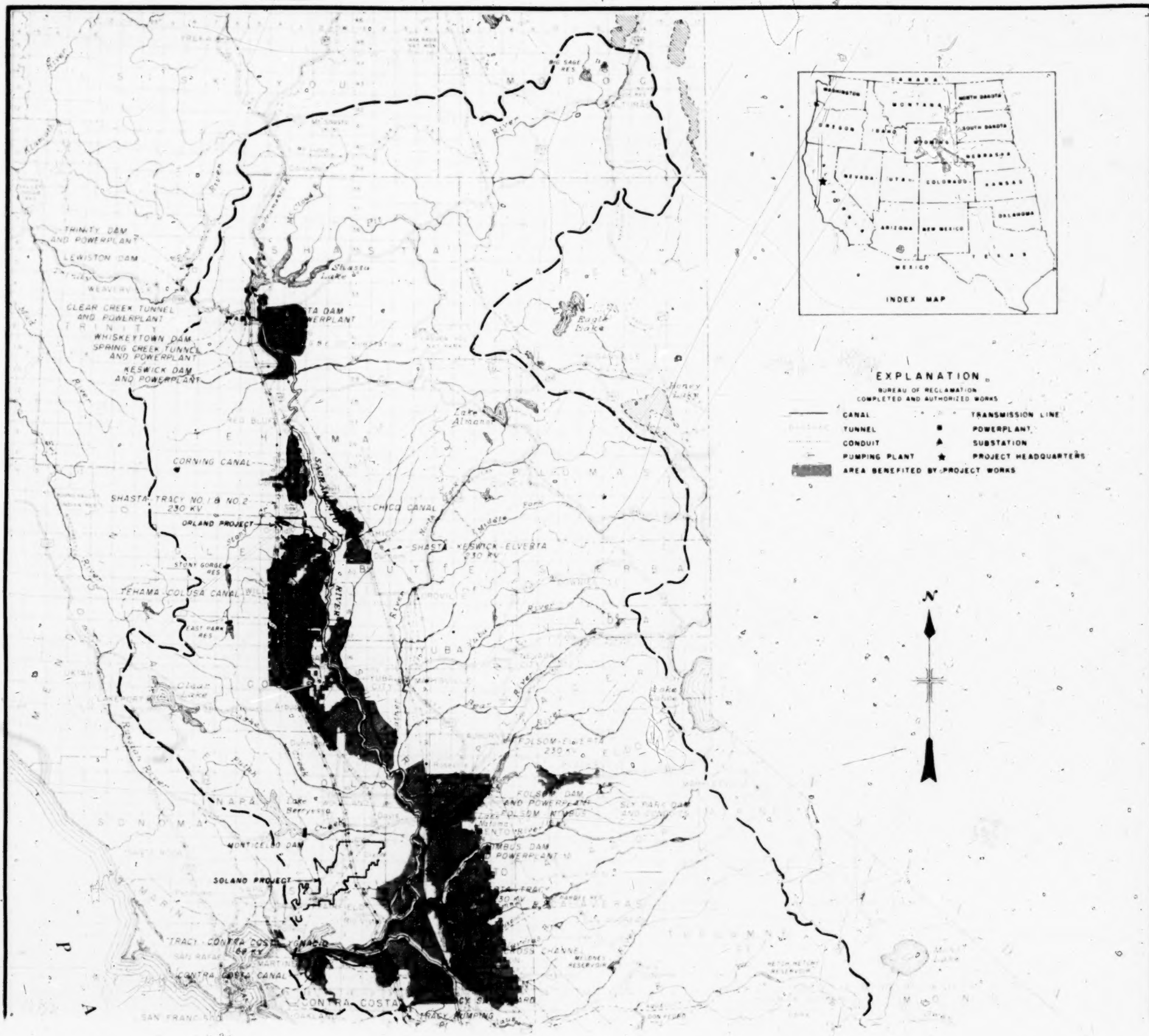
Petitioner, the City of Fresno, is the capital of Fresno County. According to the United States Department of Agriculture, Fresno County is the greatest producer of agricultural crops of any county in the United States. For a number of years the United States Department of Agriculture has listed Fresno

¹⁶"Both the City of Fresno and the Fresno Irrigation District are, and always have been, since the formulation of general plans for the Central Valley Project, fairly within the service area of the Central Valley Project."

State Water Rights Board of the State of California, Decision No. D 935, Adopted June 2, 1959, p. 68.

¹⁷"Prior to December 2, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land non-riparian to the river, situated both to the north and south of Friant in the counties of Madera, Merced, Fresno, Tulare, Kings and Kern in the State of California." (Emphasis ours.)

Gerlach Live Stock Co. v. United States, 111 Ct.Cls. 1 at 27, Aff. 339 U.S. 725 (1950), 70 S.Ct. 955, 94 L.Ed. 1231.



UNITED STATES
DEPARTMENT OF THE INTERIOR
FRED A. SEATON, SECRETARY
BUREAU OF RECLAMATION
FLOYD E. DOMINY, COMMISSIONER

CENTRAL VALLEY PROJECT

CALIFORNIA

(REGION 2)

MAP NO 214-208-3329



APRIL 1960

FACTUAL DATA ON THE CENTRAL VALLEY PROJECT

California's vast Central Valley Reclamation Project, extending 500 miles from the Cascade Range in the north, to the semiarid but fertile plains along the Kern River in the south, is a major water conservation development.

The initial features of the project were built primarily to protect the rich Central Valley from crippling water shortages. New project units now are being built to provide water and power to match the continued growth of the State, and still other additions are being planned for the future.

Features of the project now in operation or under construction will bring irrigation water to 1,300,000 acres of land, much of which already is under cultivation. Its powerplants will provide a capacity of 862,500 kilowatts to meet rapidly growing farm, industrial, and domestic power demands.

Although primarily an irrigation development, the multiple-purpose Central Valley Project also provides flood control and improvement of Sacramento River navigation, supplies domestic and industrial water, generates electric power, conserves fish and wildlife, creates opportunities for recreation, repurchases saline ocean waters from the Sacramento-San Joaquin River Delta, and serves other water uses. Shasta Dam began storing water on January 1, 1944 but the project did not become a fully integrated operation until the summer of 1951.

WATER SUPPLY

THE CENTRAL VALLEY BASIN comprises two major watersheds, that of the Sacramento River on the north and the San Joaquin River on the south. The combined watersheds extend nearly 500 miles in a northwest-southeast direction, and average about 120 miles in width. The basin is entirely surrounded by mountains except for a gap in its western edge. The valley floor occupies about one-third of the basin, the other two-thirds being mountainous; the Cascade Range and Sierra Nevada on the east rising to above 14,000 feet in elevation and the Coast Range on the west to as high as 8,000 feet. The Sacramento River with its tributaries flows southward and drains the northern part of the basin. The San Joaquin River with its tributaries flows northward and drains the central southern portion; the extreme southern portion being a closed basin. These two river systems join in the Sacramento-San Joaquin Delta where they flow through Suisun Bay and Carquinez Straits into San Francisco Bay and thence out the Golden Gate to the Pacific Ocean. The average annual runoff of the basin for the 40-year period beginning 1903-04 was 33,000,000 acre-feet, and for the critical seven-year period 1927-28 to 1933-34 inclusive it was 18,400,000 acre-feet. The average annual runoff in acre-feet at the three major dams of the Central Valley Project is as follows:

Dam	Stream	40-year average 1903-4 to 1942-3	7-year average 1927-28 to 1933-4
Shasta	Sacramento	5,725,000	3,537,000
Friant	San Joaquin	1,820,000	1,060,000
Folsom	American	2,750,000	1,550,000

FEATURES OF THE PROJECT PLAN

SHASTA DAM on the Sacramento River, below a drainage area of 6,600 square miles and with a storage of 4,500,000 acre-feet of water, regulates floods and stores the surplus winter runoff for many uses including irrigation in the Sacramento Valley, maintenance of navigation flows in the Sacramento River; conservation of fish life in the Sacramento River; protection of the Sacramento-San Joaquin Delta from intrusion of saline ocean water; transfer of water to Mendota Pool via Delta-Mendota Canal in exchange for San Joaquin River water diverted by Friant Dam; provision of water for municipal, and industrial as well as irrigation use in the Contra Costa area; and generation of hydroelectric energy. The dam is a curved concrete gravity type structure, with a height of 692 feet above the bottom of the foundation, and a crest length of 3,460 feet.

SHASTA POWERPLANT is located just below the Shasta Dam. Water from the dam is released through five

River water is transferred a distance of about 30 miles across the Delta to furnish an irrigation supply to the Tracy pumps for the Delta-Mendota Canal. It also improves irrigation supplies in the Delta and helps repulse ocean salinity.

CONTRA COSTA CANAL extends westerly along the south shore of Suisun Bay to Martinez and carries water from the Delta for municipal, industrial, and irrigation use. The system includes an intake structure on Rock Slough, four pumping plants, secondary canals and Martinez Reservoir at the terminal. The main canal is 48 miles long, has a maximum top width of 30 feet, a maximum bottom width of 7 feet, a water depth of over 7 feet, and an intake capacity of 350 cubic feet per second.

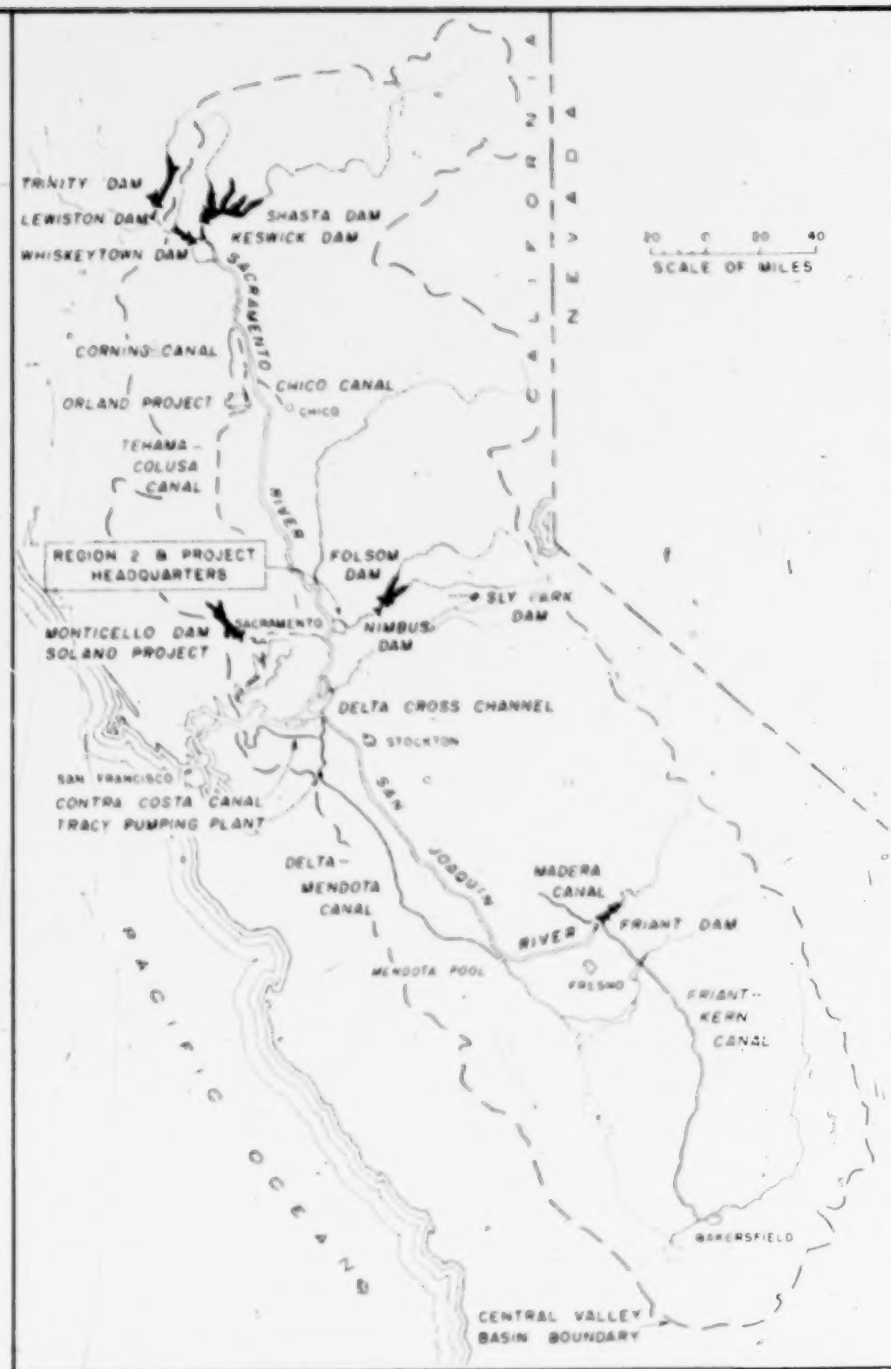
TRACY PUMPING PLANT consists of an inlet channel, pumping plant, and discharge pipes where water in the Delta, which has been released from storage in Shasta and Folsom Reservoirs or has entered the Sacramento River System below these reservoirs, is lifted 196 feet into the Delta-Mendota Canal. Each of its six pumps is powered by a 22,500 horsepower electric motor, and is capable of pumping at the rate of 767 cubic feet per second. Power to run the huge pumps is supplied by Shasta, Keswick, Folsom, and Nimbus Powerplants. The water is pumped through three 15-foot diameter discharge pipes which carry it about one mile up an inclined grade to the Delta-Mendota Canal. In the intake canal the Tracy Fish Screen has been built to intercept downstream migrant fish so they may be returned to the main channel to resume their journey to the ocean.

DELTA-MENDOTA CANAL carries water discharged by the Tracy Pumping Plant along the west side of San Joaquin Valley for a distance of 113 miles to Mendota Pool on the San Joaquin River, for use on croplands previously irrigated by diversions from the natural flow of San Joaquin River. The San Joaquin flows, thus replaced with Delta waters via the Delta-Mendota Canal, are stored in Millerton Lake behind Friant Dam and diverted north through the Madera Canal and south through the Friant-Kern Canal for use on the east side of the southern San Joaquin Valley. Delta-Mendota Canal has an intake capacity of 4,600 cubic feet per second, a maximum top width of 191 feet, maximum bottom width of 48 feet and water depth of 16 feet with lining freeboard of 1.5 feet. The terminal capacity at Mendota Pool is 3,200 cubic feet per second.

FRIANT DAM AND MILLERTON LAKE on the San Joaquin River, below a drainage area of 1,630 square miles, has a capacity of 521,000 acre-feet. It controls San Joaquin River flows and provides downstream releases to meet requirements above Mendota Pool and provides conservation storage and diversion into Madera and Friant-Kern Canals. The dam is a straight concrete gravity type structure 319 feet in height with a crest length of 3,488 feet.

MADERA CANAL with headworks located in the right abutment of Friant Dam carries water northerly to furnish new and supplemental supplies to lands in Madera County. The canal has a diversion capacity of 1,000 cubic feet per second, is 36 miles long, has a maximum top width of 35 feet, a maximum bottom width of 10 feet and a water depth of 9 feet.

FRIANT-KERN CANAL with headworks located in the left abutment of Friant Dam carries water southerly for supplemental and new irrigation in Fresno, Tulare, and Kern Counties. The canal has a maximum top width of 80 feet, a bottom width of 36 feet and 17-foot depth at lined sections. It has a normal capacity of 4,000 cubic feet per second from Friant Dam to Kaweah River at a normal water depth of 15.2 feet and is designed to permit enlargement to 5,000 cubic feet per second in the upper reach. The canal is 153 miles long, and terminates in the Kern River about four miles west of Bakersfield.



PLANNING OF ADDITIONAL PROJECT FEATURES

California's rapid growth requires that more water resource developments be added in the Central Valley Basin. Planning now is underway in various areas to assess potentialities and determine the feasibility of possible additions to the Central Valley Project.

IRRIGATION PLAN

the minimum with extremes of more than seven times the maximum.

RANGE OF TEMPERATURE

The main valley floor has warm dry summers with occasional temperatures exceeding 100°F., and mild winters with minimum rarely below 32°F. The surrounding mountains are generally warm and dry in the summer but the winter temperatures, particularly in the Cascade and Sierra Nevada, frequently drop below freezing.

15-foot diameter penstocks leading to the five main generating units and two station service units. The total nameplate capacity of these units, including two station service units of 2,000 kilowatts each, is 379,000 kilowatts.

KESWICK DAM AND POWERPLANT on the Sacramento River nine miles downstream, provides an offbay for Shasta and smooths out the uneven water releases through Shasta Powerplant. The dam also has migratory fish trapping facilities operating in conjunction with Coleman Fish Hatchery on Battle Creek 25 miles downstream. Keswick is a concrete gravity type structure 159 feet in height above the bottom of the foundation and has a crest length of 1,046 feet. The powerplant has three generating units with a total nameplate rating of 75,000 kilowatts.

FOLSOM UNIT consists of Folsom Dam, Reservoir, and Powerplant and Nimbus Dam, Lake Natoma, and Nimbus Powerplant on the American River below a drainage area of about 1,875 square miles. The Folsom Unit was added to the Central Valley Project by Congressional authorization in 1949. Folsom Dam was constructed by the Corps of Engineers and on completion turned over to the Bureau of Reclamation for coordinated operation with other project structures. The dam is composed of a concrete main river section having a maximum height of 340 feet above the bottom of foundation and a crest length of 1,400 feet, flanked by long earth-fill wing dams extending from the ends of the concrete section on both abutments. In addition there is an earthfill auxiliary dam at Mormon Island saddle and eight other earthfill dikes. The reservoir has a capacity of 1,000,000 acre-feet. Folsom Powerplant, constructed and operated by the Bureau of Reclamation, is located just below the dam and has a nameplate capacity of 162,000 kilowatts. The dam regulates flows of the American River for irrigation, power, flood control, municipal and industrial use, fish and wildlife, recreation, and other purposes. Nimbus Dam, located about seven miles below Folsom, is an offbay to regulate the power releases through Folsom Powerplant and also can serve as a diversion dam for the proposed Folsom South Canal. A 13,500 kilowatt powerplant is located at the toe of Nimbus Dam. Also at Nimbus Dam is the 30,000,000 egg Nimbus Fish Hatchery which was built to compensate for the spawning area of salmon and steelhead that was cut off at Nimbus Dam. Studies of possible canals to irrigate lands north and south of the American River from the water made available from Folsom Reservoir are in progress.

SLY PARK UNIT was added to the Central Valley Project in 1949 along with the Folsom Unit. It includes Jenkinson Lake formed by Sly Park Dam on Sly Park Creek, a low concrete diversion dam on Camp Creek and the Sly Park-Camino Conduit. Sly Park Dam is an earthfill structure 190 feet high with a crest length of 760 feet, and an auxiliary earthfill dam 125 feet high with a crest length of 650 feet. It has a storage capacity of 41,000 acre-feet. The concrete diversion dam on Camp Creek and a short connecting tunnel from Camp Creek to Sly Park Creek augment the inflow into Jenkinson Lake. Sly Park-Camino Conduit with a capacity of 125 cubic feet per second extends about 7 miles from Sly Park Dam to deliver supplemental water to El Dorado Irrigation District for irrigation and municipal purposes in the vicinity of Placerville.

DELTA CROSS CHANNEL consists of a controlled diversion channel between the Sacramento River and the Mokelumne River at the north end of the Delta and several natural and artificial channels through which Sacramento

POWER TRANSMISSION SYSTEM consists of switchyards, high voltage lines, and substations for delivery of power to project pumps and for wholesale disposal of excess power. The backbone system consists of three 230 kilovolt circuits from Shasta Powerplant to Tracy Pumping Plant, with a 230 kilovolt connection to Folsom powerplant.

IRRIGATION DISTRIBUTION SYSTEMS consist of lateral canals and pipe systems to take water from the main canals and deliver it to individual farms. The Bureau of Reclamation has built several distribution systems and is constructing others for the water users. Some systems or parts of systems already are in existence, and some are being built by local districts.

PROJECT FEATURES UNDER CONSTRUCTION

SACRAMENTO CANALS UNIT was added to the Central Valley Project in 1950. It consists of a system of three main canals to supply irrigation water to lands in the Sacramento Valley, principally in Tehama, Glenn, Butte, and Colusa Counties. The Tehama-Colusa Canal 121 miles long and with an intake capacity of 2,000 cubic feet per second will divert water by gravity from the Red Bluff Diversion Dam on Sacramento River near Red Bluff and serve lands in Tehama, Glenn, Colusa, and northern Yolo Counties. The Corning Canal 26 miles long with an initial capacity of 500 cubic feet per second will divert from the Tehama-Colusa Canal 1/2 mile downstream from the dam with a 55 foot lift pumping plant and will serve lands in Tehama County lying at a higher elevation than can be served from the Tehama-Colusa Canal. The Chico Canal and pumping plant will lift water 30 feet from the Sacramento River near Vina. The canal will have a capacity of 310 cubic feet per second and a length of 26 miles, serving lands principally in Butte County in the vicinity of Chico. The three canals combined will serve over 200,000 acres of land.

THE TRINITY RIVER DIVISION which was authorized by the Congress in 1955 will divert surplus water from the Trinity River Basin into the Sacramento River. The Trinity River joins the Klamath River which flows directly into the Pacific Ocean. Above Lewiston Dam site the river drains about 720 square miles of high-water-producing, mountainous country. Trinity River Division will consist of three dams, two tunnels, and four powerplants to provide an additional irrigation water supply for the Central Valley and additional power generating capacity for Northern and Central California, as well as to improve recreational opportunities and increase minimum flows in the Trinity River.

Trinity Dam on the Trinity River, an earthfill structure 450 feet high will create a reservoir of 2,500,000 acre-foot capacity to regulate flows and store surplus water runoff for irrigation. Trinity Powerplant at Trinity Dam will have an installed capacity of 96,000 kilowatts. Lewiston Dam, about 7 miles below Trinity, will serve as an offbay and a diversion dam to divert water through tunnels and powerplants to the Central Valley. A possible Lewiston Powerplant, using releases for the support of fish life and for other downstream purposes in the Trinity River, will have an installed capacity of about 1,000 kilowatts. An 11 mile long tunnel will bring water from Lewiston Dam to a 130,000 kilowatt powerplant on Clear Creek. Whiskeytown Dam on Clear Creek will regulate releases from the powerplant and divert them as well as usable Clear Creek flows into a 3 mile long tunnel, to a 143,000 kilowatt powerplant on the edge of Keswick Reservoir.

The reservoirs of the Central Valley Project are coordinated in their operation in order to obtain maximum yields and to deliver water into the main river channels and into the canals of the project in the most efficient and economical manner. Irrigation and municipal water is delivered from the main canals in accordance with long-term contracts negotiated with irrigation districts and other local organizations. The distribution of water from the main canals to the individual users is the responsibility of the local districts.

IRRIGABLE ACRES IN THE PROJECT

The irrigable acreage of the service area of the authorized Central Valley Project, is approximately 1,300,000 acres. Irrigation service is furnished to new lands and a supplemental supply for presently irrigated areas.

CHARACTER OF SOIL IN IRRIGABLE AREAS

The preponderance of the soils in the project service area are recent alluvial deposits. About one-third of the alluvial soils have moderately compacted subsoils which limit crop adaptability and the types of farming which may be pursued. Shallow residual soils are found on the small area of foothill lands included in the service area.

ALTITUDE OF IRRIGABLE AREA

The irrigable lands lie largely below 500 foot elevation, except for the Sly Park Unit which is in the foothills at an elevation of around 2,500 feet.

FARM WATER REQUIREMENT

The farm water requirement varies somewhat climatologically but principally by crop and soil types. Under good irrigation practices the per acre water requirement will vary from as little as one acre-foot for grain to as much as seven acre-feet for rice. The overall farm water use for the Central Valley Project probably averages around three acre-feet per acre.

LENGTH OF IRRIGATION SEASON

The irrigation season extends over a period of from six to eight months. The total growing season averages over 240 days.

ANNUAL RAINFALL

Precipitation varies throughout the Central Valley geographically, seasonally, and annually. On the main valley floor the rainfall is comparatively light, decreasing from an annual normal of 22 inches at Red Bluff in the north to 6 inches at Bakersfield in the south.

In the Cascade Range and Sierra Nevada on the east side of the valley the precipitation varies from a normal annual high of 80 inches in the north to 35 inches in the south, a large portion of which falls as snow above the 3,100 to 6,400 foot elevation. Precipitation in the Coast Range is less than in the Cascade Range and Sierra and falls almost entirely as rain. Nearly all precipitation occurs in the months October to April. Precipitation varies from year to year, the maximum being generally 3.5 times

The average annual temperature for Sacramento is about 60 degrees, while the average annual temperature for Fresno is about 63 degrees. The average frost-free period in the valley is about 9 months and the remaining winter months are mild with an average of less than 15 days having a minimum temperature below 32 degrees.

PRINCIPAL PRODUCTS

Of the 220 different crops grown on Central Valley farms, the principal ones are field crops—including alfalfa, irrigated pasture, sugar beets, beans, barley, cotton seed rice, truck crops—including asparagus, tomatoes, melons, and a variety of other vegetables, fruits and nuts, including grapes, peaches, plums, prunes, apricots, pears, figs, olives, oranges, almonds, and walnuts. Field, truck, and pasture seed crops are raised extensively. Practically all of these crops are grown under irrigation, except for some barley, almonds and beans. Over 90 percent of the gross farm income of the Central Valley Basin is from irrigated crops. Although the production of livestock for slaughter and dairy products is very important in the Central Valley, their present production is inadequate to meet local requirements.

PRINCIPAL MARKETS

Because of the favorable climate conducive to the production of many specialty agricultural commodities, crops enjoy a wide distribution, being shipped to all major national and to many international markets. Livestock, livestock products, and basic field crops are primarily marketed locally where increasing markets are developing as a result of substantial population growth.

POWER MARKET

The rapidly increasing demand for power in Northern California assures a ready market for surplus project generation not needed for pumping project water. Power is being sold to about 25 public and Federal agencies by means of wheeling and exchange agreements with the Pacific Gas and Electric Company. Under these agreements the company's transmission facilities are used to serve project customers, and support energy is available at times of low project generation.

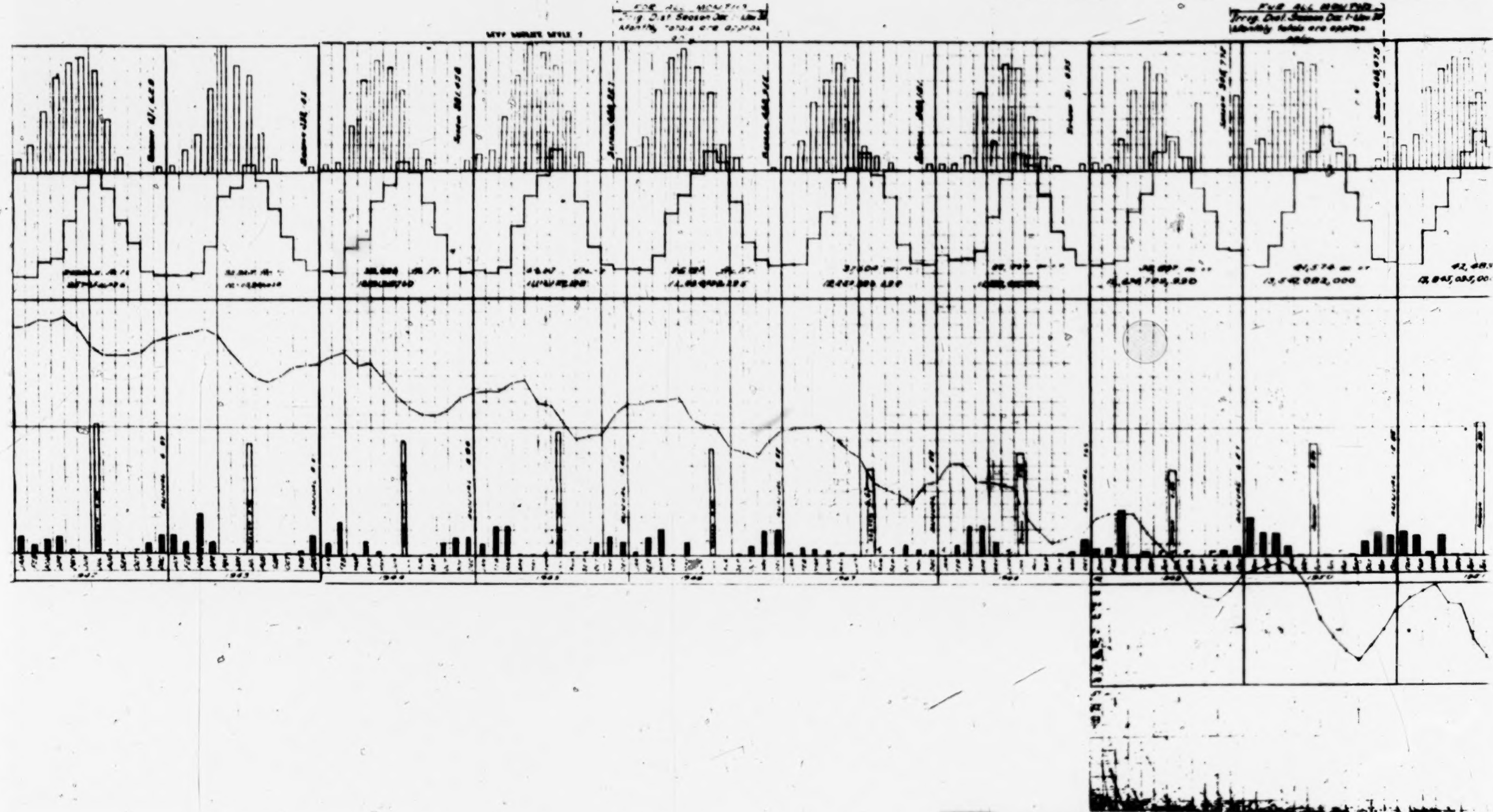
OTHER BUREAU OF RECLAMATION PROJECTS IN THE CENTRAL VALLEY BASIN

ORLAND PROJECT with its related storage and diversion facilities was authorized for construction in 1907 and is not a part of the Central Valley Project. Details will be found on a separate Orland Project map. The project has been operated and maintained by the Orland Unit Water Users Association since October 1954.

SOLANO PROJECT with Monticello Dam and Putah South Canal as its major features is separate from the Central Valley Project. Details of the plan will be found on a map covering that project.

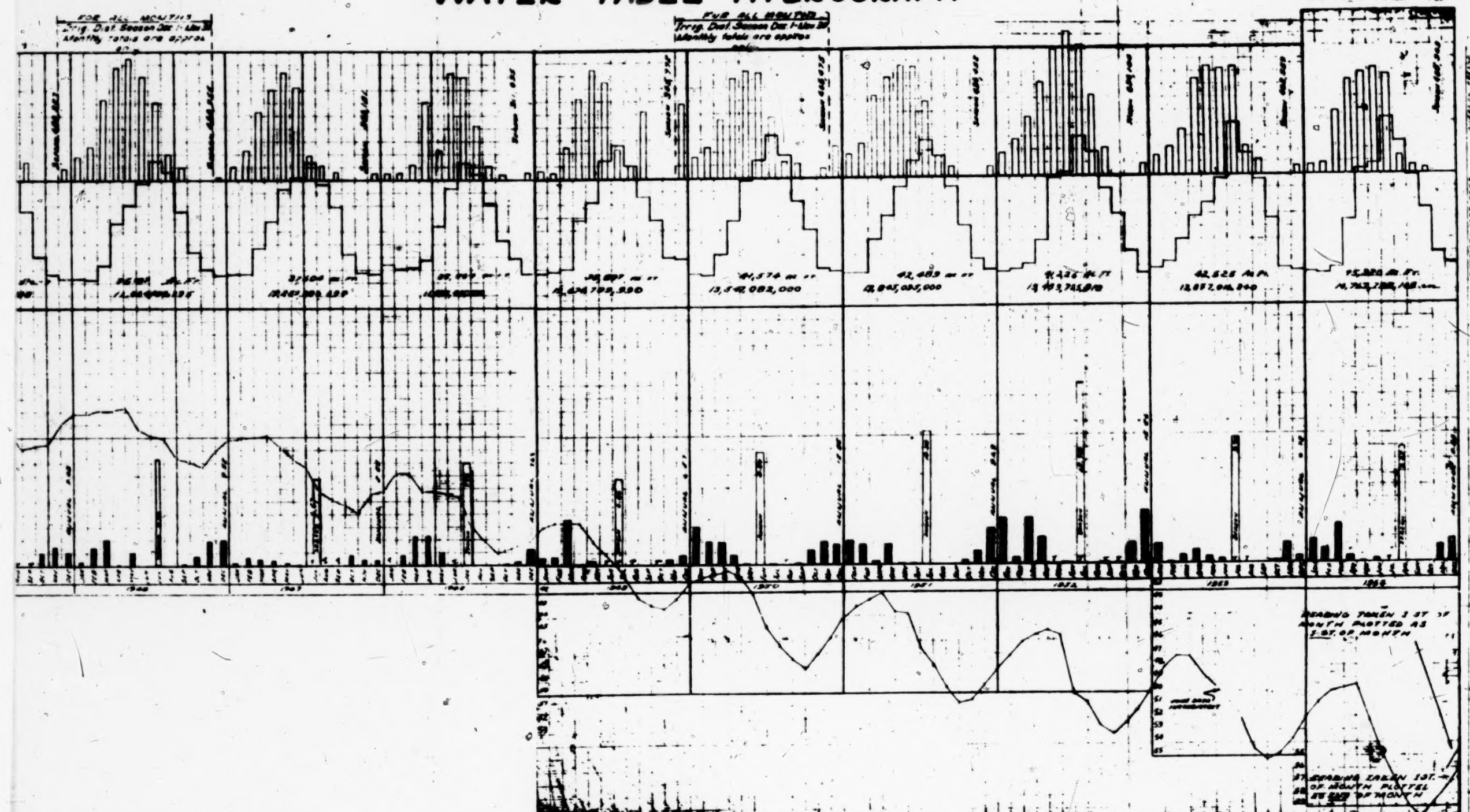
Address all inquiries regarding additional information concerning this Project to:
REGIONAL DIRECTOR, REGION 2, BUREAU OF RECLAMATION
P. O. BOX 2511, SACRAMENTO, CALIFORNIA

WATER TABLE HYDROGRAPH



WATER TABLE HYDROGRAPH

EXHIBIT II



County as the greatest producer of agricultural products in the United States. In the year 1959 the county produced agricultural crops of a market value of \$390,211,118.00. Petitioner, City of Fresno, has a population of 133,929.

The City of Fresno is presently supplied with water by pumping from wells, a large part of which wells were and are supplied by percolating waters from the San Joaquin River. The District Court so found and its decision in this regard was affirmed by the Court of Appeals.

The underground water level in Fresno County and particularly in the City of Fresno had been dropping steadily when the Central Valley Project started and has steadily continued to drop as shown by the chart on the opposite page.

The City of Fresno is presently pumping 60,000 acre-feet a year from the fast diminishing underground while according to Bureau of Reclamation officials, it can only safely pump 30,000 acre-feet a year from this source.¹⁸

The Bureau of Reclamation's own witnesses admitted that the City of Fresno needs an immediate additional surface supply of 100,000 acre-feet of supplemental surface water in order to survive.¹⁸ The

¹⁸"The Witness. Yes, your Honor. Probably from the underground supply that would be around 30,000 acre-feet and the rest would have to come from the surface * * *.

The Court. He didn't say that. He said they could safely have a supply underground of 30,000 and would need another 100,000 acre-feet."

Testimony of U.S.B.R. Engineer Leland K. Hill, R. 1983.

City's engineers estimated the City of Fresno needs at least 150,000 acre-feet of water. o

7. The Record in This Case.

The printed record in this case has already been filed with the Court in Case No. 366, October Term, 1961 of this Court—the Petition for Writ of Certiorari filed by the appellant Bureau of Reclamation officials. However, this does not constitute the entire official record in this case.¹⁰

¹⁰The complete record in this case is 50,000 pages. The trial before the District Court took nineteen months of continuous trial and the decision of the District Court involves 263 separate rulings—the largest number of points ever decided in a single case according to West's Publishing Company. The parties printed the material portion of the record but not all of the record in order to economize. The trial judge was dissatisfied with the record as printed and on the 31st day of March, 1959, in accordance with Rule 75(i), Federal Rules of Civil Procedure, ordered the entire remaining unprinted record to be made a part of the record and shipped it to the Ninth Circuit Court of Appeals where it now is. The Department of Justice appealed the District Court's order but did not perfect their appeal and therefore the District Judge's order became final. The unprinted portion of the record was generously quoted from by all parties before the Ninth Circuit. It is respectfully suggested that the entire record be shipped to this Court for the use of this Court.

VI

REASONS FOR GRANTING WRIT

1. **THE DECISION OF THE COURT OF APPEALS, THAT THE DETERMINATION OF WHETHER CHARGES FOR WATER TO THE CITY OF FRESNO BY THE APPELLANT BUREAU OF RECLAMATION OFFICIALS WERE REASONABLE OR UNREASONABLE IS AN ADMINISTRATIVE DECISION AND NOT A JUDICIAL DECISION IS ERRONEOUS.**

The District Court found—after months of taking testimony by experts in the field of construction and operation of dams—that any charge to the City of Fresno by the appellant Bureau of Reclamation officials for municipal water in excess of \$3.50 per acre-foot was both arbitrary and unreasonable. This part of the decision was based upon voluminous testimony. The appellant Bureau of Reclamation officials, who are also petitioning this Court for a Writ of Certiorari, do not contend that the decision of the District Court in this regard is unsupported by evidence. Neither did the Court below find that this decision of the District Court was not supported by sufficient evidence. The Court of Appeals merely held that the determination of whether the rate for water out of a Bureau of Reclamation project was reasonable or unreasonable was strictly an administrative and not a judicial decision and that the City of Fresno was helpless to do anything about the excessive rate charged. We quote from the opinion of the Court below:

“Fresno alleges that the monetary demands of these defendants for the supplying of such water

are excessive. The district court so found. It ruled that Fresno was entitled to 'a declaratory judgment that any charge for water which may be made by the United States should be reasonable.' It specified that reasonableness required that such charge should be 'no more than the irrigation districts (supplied by Friant) are charged from time to time for Class I water.' (*Rank v. United States*, supra at page 185).

"In negotiating and contracting for the delivery of water from Friant Dam, defendant officials were acting within the scope of their statutory authority and were carrying out the duties imposed upon them by their official positions. *It is their administrative function to determine the rates at which water shall be delivered.*" (Emphasis ours.)

Appendix, page 25.

The Court below then went on to erroneously state that the appellant Bureau of Reclamation officials were not limited in fixing rates to what the courts may find to be reasonable and in effect that the courts were powerless to grant relief where an administrative official charges unreasonable rates for water from a government project.

"*It cannot be said that their statutory authority is limited to the making of such determinations as the courts may find to be reasonable.*" (Emphasis ours.)

Appendix, page 25.

We submit that the Court below was in error in this regard and that its decision is in direct conflict with the decisions of this Court.

Stark v. Wickard, 321 U.S. 288, 64 S. Ct. 559, 88 L. Ed. 733—(enjoining Secretary of Agriculture from enforcing unreasonable minimum milk prices set by him).

“The public have a right to be exempt from unreasonable exactions. * * *” (Syllabus.)

Smyth v. Ames, 169 U.S. 466, 42 L. Ed. 819, 18 S. Ct. 418. (Syllabus.)

“The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable. * * * But that involves an inquiry as to what is reasonable and just for the public. * * * The public cannot properly be subjected to unreasonable rates. * * *”

Covington & L. Turnpike Co. v. Sandford, 164 U.S. 578, 41 L. Ed. 560, 566.

“* * * when a case arises in which it becomes necessary to determine whether a properly established rate is a reasonable or constitutional one either to protect the public against excessive or unreasonable charges or to protect a public utility against the infringement of its constitutional rights * * * the courts may determine the reasonableness of such rate and may enjoin the enforcement of an unjust, unreasonable * * * rate.” (Emphasis ours.)

43 Am. Jur. 693, 694.

2. **THE COURT BELOW IS IN ERROR IN HOLDING THAT THE DETERMINATION OF THE LIMITS OF AUTHORITY GRANTED AN ADMINISTRATIVE OFFICER BY CONGRESS IS AN ADMINISTRATIVE AND NOT A JUDICIAL DECISION.**

The District Court enjoined the illegal diversion of Central Valley Project water to lands outside of the county and watershed of origin and which were not to be supplied with water from the Central Valley Project until the needs of the City of Fresno were met.²⁰ The Court below reversed the District Court on this point holding that the determination of the service area of the Central Valley Project as set forth in the Feasibility Report and acts of Congress was an administrative and not a judicial determination.²¹

It is submitted that the determination of the limits of a mandate of Congress to an administrative agency such as the designation of the service area of the Central Valley Project by Congress is a judicial determination and not a discretionary administrative determination.

²⁰"The City of Fresno is in the County of origin and the Watershed of origin of the San Joaquin River. The legislature in 1951 added Section 11128, specifically making the County and Watershed of Origin Statutes applicable to federally constructed units of the Central Valley Project."

Rank v. Krug, 142 F.Supp. 1, 184.

²¹"The district court ruled that under these statutes the United States, prior to diverting San Joaquin water beyond the watershed or county of origin, *must satisfy the needs of Fresno*.

"• • • The terms upon which the United States is willing to act in this respect remain an administrative decision which it is within the authority of the defendant officials to make." (Emphasis ours.)

Appendix, page 26.

"Where Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." (Syllabus.)

Stark v. Wickard, Secretary of Agriculture,
321 U.S. 288, 64 S. Ct. 559, 88 L. Ed. 733
(Syllabus).

"The responsibility of determining limits of statutory authority of administrative agencies is a judicial function." (Syllabus.)

Stark v. Wickard, Secretary of Agriculture,
321 U.S. 288, 64 S. Ct. 559, 88 L. Ed. 733
(Syllabus).

"This suit alleges that the Secretary of Agriculture is disobeying a congressional mandate. Such allegation gives this court jurisdiction and the suit is not one against the United States. * * * In this case the Secretary has disobeyed the congressional mandate."

Publisher Industries v. Anderson, 68 F. Supp.
532, 533 (1946).

-
3. THE COURT BELOW ERRONEOUSLY HELD THAT THE CITY OF FRESNO'S UNDERGROUND PERCOLATING WATER SUPPLY LOCATED IN THE WATERSHED AND COUNTY OF ORIGIN OF THE SAN JOAQUIN RIVER AND USED FOR MUNICIPAL AND DOMESTIC PURPOSES, COULD BE TAKEN BY THE APPELLANT BUREAU OF RECLAMATION OFFICIALS BY EMINENT DOMAIN OR CONDEMNATION AND USED IN OTHER COUNTIES FOR AGRICULTURAL PURPOSES.

As heretofore stated in our Statement, Chapter V, the City of Fresno is located in both the watershed

and county of origin of the waters of the San Joaquin River. It presently pumps its water from the fast diminishing supply of underground percolating water underlying the city which is in large measure supplied by percolation from the San Joaquin River below Friant Dam. This underground supply has been steadily dropping since Friant Dam was completed in 1944 (See Chart opposite page 25 hereof). The city is now pumping over 60,000 acre-feet a year from this fast diminishing source. Bureau of Reclamation engineers, at the trial before the District Court testified, the city should not pump over 30,000 acre-feet from this underground source of supply.²²

The City of Fresno also needs a supplemental surface supply of water of at least 100,000 acre-feet a year from Friant Dam to off-set its fast diminishing underground water supply. This fact was also admitted by the appellant Bureau of Reclamation officials.²³

This percolating underground water right of the City of Fresno in California is held to be the same or analogous to a riparian right.

“* * * an overlying landowner * * * has been held to have analogous rights to those of a riparian.” (Syllabus.)

Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, 3 Cal. 2d 489 (1935), 45 P.2d 972.

²²Testimony of Witness Leland K. Hill, U.S.B.R. Engineer, R. 1983.

²³Testimony of Witness Leland K. Hill, U.S.B.R. Engineer, R. 1982.

The Court below correctly held that the City of Fresno had vested rights to this underground water originating from the San Joaquin River below Friant Dam.

“Fresno, as an overlying landowner, has vested rights to underground waters from a source fed by the San Joaquin.”

Appendix, page 25.

The Court below also correctly held that the United States had not taken these rights by eminent domain or condemnation.

“We conclude that the water rights of these plaintiffs have not been acquired by the United States through exercise of its power of eminent domain.”

Appendix, page 41.

However, the Court of Appeals went further and erroneously held that the appellant Bureau of Reclamation officials had the right to acquire the underground percolating waters of the petitioner, the City of Fresno, used to supply domestic and municipal water by eminent domain or condemnation and to give it to farmers outside the county and watershed of origin for agricultural uses. We quote from the opinion of the Court below in this regard which we feel is in error.

“We conclude that the United States has the power to acquire the rights of these plaintiffs through exercise of eminent domain.”

Appendix, page 31.

Assuming for the purpose of argument that the Government of the United States can acquire *anything* needed by it for general welfare purposes through its power of eminent domain, nevertheless, Congress here never authorized these appellant Bureau of Reclamation officials to take the underground percolating waters of the City of Fresno, needed for human consumption and domestic use, which use either under the laws and statutes of the State of California or under the decisions of this Court, have priority over agricultural uses, and to take them out of the county of origin and watershed of origin of the San Joaquin River in violation of the Basic Reclamation Act of June 17, 1902 (32 Stat. 388; 43 U.S.C. 391 et seq.) and turn them over to farmers outside the watershed and county of origin for strictly agricultural purposes on undeveloped lands on which Congress had prohibited the use of Central Valley Project water.²⁴

²⁴"Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, . . ."

Act of June 17, 1902 (32 Stat. 388, 390) (43 U.S.C. 391 et seq.).

Such is the ruling of this Court.

"We have then a direction by Congress to the Secretary of the Interior to proceed in conformity with state laws in appropriating water for irrigation purposes."

State of Nebraska v. State of Wyoming, 325 U.S. 589, 612, 65 S.Ct. Rep. 1332, 1348.

"The Basic Reclamation Act under which the Central Valley Project was constructed provides that the Bureau of Reclamation must recognize and protect all existing water rights in any state in which it operates."

State of Oregon v. Fed. Power Commission, 211 F. 2d 347 (9th Cir. 1954).

The laws of the State of California in which the Central Valley Project is located, specifically provide that water for domestic use is the highest use of water in California.

"Highest uses of water; domestic; irrigation. It is hereby declared to be the established policy of this State that the use of *water for domestic purposes is the highest use of water* and that the next highest use is for irrigation (Stats. 1943, c. 368, p. 1606.)." (Emphasis ours.)

California Water Code, Sec. 106.

"State Use and Control of Water. It is hereby declared that the people of the State have a paramount interest in the use of all the water of the State and *that the State shall determine* what water of the State, surface and underground, can be converted to public use or controlled for public protection. (Stats. 1943, c. 368, p. 1606.)" (Emphasis ours.)

California Water Code, Sec. 104;

California Constitution, Art. XIV, 3.

The laws of the State of California also provide that no water shall be taken out of a watershed or county of origin until the needs of the watershed and county of origin are fully supplied.

"Prior right to watershed water. In the construction and operation by the authority of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the authority directly or indirectly of the prior right to all of the water rea-

sonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein. (added Stats. 1943, c. 370, p. 1896.)”

California Water Code, Sec. 11460.

“Limitations. The limitations prescribed in Sections 11460 and 11463 shall also apply to any agency of the State or Federal Government which shall undertake the construction or operation of the project, or any unit thereof, including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object contemplated by this part. (added Stats. 1951, c. 1325, p. 3216, Sec. 1.)” (Emphasis ours.)

California Water Code, Sec. 11128.

This Court has held that it is for the state to say what rights of a riparian owner may subsist along with a federal right.

*“... any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water * * * this clearly leaves it to the State to say what rights of an appropriator or riparian owner may subsist along with any federal right.” (Emphasis ours.)*

United States v. Gerlach Live Stock Co., 339

U.S. 725, 734; 70 S. Ct. 955, 960 (footnote), (1950); 94 L. Ed. 1231.

Moreover the Bureau of Reclamation consistently represented to Congress that it would recognize county

of origin and watershed of origin statutes in their operation of the Central Valley Project.

"66. IN ADDITION TO RESPECTING ALL EXISTING WATER RIGHTS, THE BUREAU IN THIS REPORT HAS COMPLIED WITH CALIFORNIA'S COUNTY-OF-ORIGIN LEGISLATION, WHICH REQUIRES THAT WATER SHALL BE RESERVED *for the presently unirrigated lands of the areas in which the water originates, to the end that only surplus waters will be exported elsewhere.* * * *"
(Emphasis ours.)

Senate Document 113, 81st Congress, Page 65,
Plaintiffs' Exhibit 136, R. 2285.

Finally, and what is most important, Congress itself specifically required the appellant Bureau of Reclamation officials to conform to county of origin and watershed of origin acts in reauthorizing the Central Valley Project.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, that the Central Valley project, California, authorized by section 2 of the Act of Congress of August 26, 1937, (50 Stat. 850), is hereby reauthorized * * *.

"Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the USE OF WATER IN ACCORD WITH STATE WATER LAWS,

INCLUDING BUT NOT LIMITED TO SUCH LAWS GIVING PRIORITY TO COUNTIES AND AREAS OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (Emphasis ours.)

Reauthorization Act of October 13, 1949 (63 Stat. 852, 853).

It is therefore submitted that the Court below was in error in holding that the appellant Bureau of Reclamation officials could take the underground percolating waters used by petitioner, the City of Fresno required for municipal and domestic uses in the county and watershed of origin of said waters, by condemnation or eminent domain, and transport and use them out of the county and watershed of origin for lower priority agricultural uses on non-cultivated lands on which Congress had expressly prohibited the use of Central Valley Project water.²⁵

²⁵Although nowhere in the record does it appear and although it is therefore immaterial to this appeal, it might be pointed out to this Court that while this case was on appeal to the Court below the present appellant Bureau of Reclamation officials granted the petitioner a contract for 60,000 acre-feet of water at \$10.00 per acre foot. *This contract, however, expressly provided that the price may be reduced and the amount increased in accordance with the final determination of this case on appeal.*

4. SINCE NO ERROR OF THE DISTRICT COURT IN REGARD TO THAT PART OF ITS DECISION THAT ANY CHARGE IN EXCESS OF \$3.50 PER ACRE-FOOT BY APPELLANT BUREAU OF RECLAMATION OFFICIALS TO THE CITY OF FRESNO FOR WATER WAS UNREASONABLE WAS CITED IN APPELLANTS' DESIGNATION OF RECORD ON APPEAL, NOR IN THEIR APPEAL BRIEFS, NOR DID THE COURT BELOW FIND THAT THIS PART OF THE DECISION OF THE COURT BELOW WAS UNSUSTAINED BY EVIDENCE, IT WAS ERROR FOR THE COURT OF APPEALS TO REVERSE THE DISTRICT COURT ON THIS PORTION OF ITS DECISION.

No error of the trial Court was cited in appellants' statement of points on appeal as to the District Court's finding that any charge in excess of \$3.50 per acre-foot to the City of Fresno was unreasonable as required by Rule 75 (d), Federal Rules of Civil Procedure (28 U.S.C. 75 (d)). Objection to the price of water cannot therefore be raised on this appeal. Numerous authorities supporting this point have been cited in our appeal brief so we will not further discuss the matter. (*Jesionowski v. Boston & M.R.R.* (1947), 329 U.S. 452, 67 S. Ct. 401, 91 L. Ed. 416; Sec. 6158, *Cyclopedia Federal Procedure*, 3rd Ed.; *Cakmar v. Hoy*, 265 F. 2d 59 at 62 (9th Cir. 1959); *State of Washington v. U.S.*, 214 F. 2d 33 at 44 (9th Cir. 1954); *Bennett v. Scofield*, 170 F. 2d 887 (5th Cir. 1948).)

Neither did the appellant Bureau of Reclamation officials contend, nor did the Court below find, that this finding of the District Court was unsustained by the evidence.

5. **THE DECISION OF THE COURT BELOW IN DISMISSING THE UNITED STATES AS A PARTY TO THE PRESENT ACTION IS ERRONEOUS.**

The District Court joined the United States as a party to this action under the Act of July 10, 1952 (66 Stat. 518, 560, Section 208, Subsection (a)) reading as follows:

"Sec. 208. (a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit."

Act of July 10, 1952 (66 Stat. 518, 560, Sec. 208, Subsection (a)).

The Court below reversed the District Court and ordered the United States dismissed as a party defendant.

It is submitted that the decision of the Court below is erroneous in the following particulars:

- (a) **The Court Below Erroneously Held That the United States Could Not Be Brought Into a Class Action Suit Under the Act of July 10, 1952.**

Under the later decisions of this Court, waiver of immunity of the United States to suit should be liberally construed.

"The Government has premised its position largely on the principle that statutes in derogation of sovereign immunity must be strictly construed. *Where a statute contains a clear and sweeping waiver of immunity from suit on all claims* with certain well defined exceptions, resort to that rule cannot be had in order to enlarge the exceptions." (Emphasis ours.)

United States v. Yellow Cab Co., 340 U.S. 543, 554, 71 S. Ct. 399, 406, 95 L. Ed. 523.

"*'Sovereign immunity'* * * * undoubtedly runs counter to democratic notions of the moral responsibility of the State. Accordingly, courts reflect a strong legislative momentum in this tendency to extend the legal responsibility of the government and to confirm Mailland's belief expressed nearly fifty years ago, that 'it is a wholesome sight to see "the crown" sued and answering to its Torts'." (Emphasis ours.)

Justice Frankfurter, *Larson v. Domestic and Foreign Commerce Corp.*, Footnote, 337 U.S. 682, 723, 69 S. Ct. 1457 (1948), 93 L. Ed. 1028.

The Act of July 10, 1952 (66 Stat. 518, 560, Section 208 (a)) refers to "*any suit*". A statute should be construed according to the "plain, obvious meaning of the statute". (*Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 45 S. Ct. 274, 69 L. Ed. 660.) "Any suit" means "all suits". *Richardson v. Ainsa*, 218 U.S. 289, 31 S. Ct. 23, 54 L. Ed. 1044; 3 C. J., 232; 3 C. J. 235, Note 72 (a); *U. S. v. Swift & Co.*, 158 F. Supp. 551, 554, 555.

The Court below assumed the presence of some infinitesimal appropriative and prescriptive rights would prohibit a class action but it is submitted that under the "plain, obvious meaning of the statute" a class action is clearly within the meaning of "any suit" as used in the Act of July 10, 1952 (66 Stat. 518, 560, Section 208, Subsection (a)) and that the United States was properly joined as a party defendant.

(b) The Lower Court Was in Error When It Held That All Necessary Parties Were Not in Fact Joined in the Present Action.

All the appellant irrigation districts having contracts to water from Friant Dam are parties to this action. The entire Central Valley Project was constructed on the theory that it would not affect any water rights below the junction of the San Joaquin River and the Merced River.²⁶ The United States had acquired all water rights between this junction of the Merced River and Friant Dam²⁷ with the exception of 57 water rights represented by the named plaintiffs in the class action complaint filed by them. The United States was a party to this action. The District Court

²⁶State of California Report No. 3, "Definition of Rights to the Waters of the San Joaquin River Proposed For Diversion to Upper San Joaquin Valley", August, 1936.

²⁷Defendants' Exhibit A-48-A and Defendants' Exhibit A-9-A-1.

passed on the title and water rights of each separate parcel of land between Friant Dam and Gravelly Ford Canal (R. 990-996 and R. 999), a point located 38 miles downstream from Friant Dam which was the lowest point on the San Joaquin River to be supplied with water out of Friant Dam.²⁸

- (c) The Decision of This Court in the Present Case Is Not Consistent With the Decision of This Same Court in the Case of *People of the State of California v. United States*, 235 F.2d 647 (9th Cir.) Nor With *Miller v. Jennings*, 243 F.2d 157 (5th Cir.) Which Latter Case Is Based Upon *People of the State of California v. United States*, *Supra*.

In holding that the United States should be dismissed as a party in this action this Court relied on the case of *People of the State of California v. United States*, *supra*. *Miller v. Jennings*, *supra*, is based on this case. The last paragraph of this Court's decision in *People of the State of California v. United States*, *supra*, is respectfully pointed out to this Court:

"The cause is therefore reversed and remanded with directions to take further proceedings in accordance with this opinion and enter no judgment until the entire suit can be disposed of at the same date." (Emphasis ours.)

People of the State of California v. United States, 235 F. 2d 647 at 664 (9th Cir. 1956).

²⁸9. (a) Defendant's plan, as modified contemplated among other things, that the United States should eventually store and divert to nonriparian use the waters of the San Joaquin River originating above Friant Dam and formerly flowing at or below Gravelly Ford, except for releases from Friant which would be for one or more of three purposes: (1) to satisfy riparian rights between Friant and Gravelly Ford; * * * (Emphasis ours.)

Wolfsen v. United States, 162 F.Supp. 403 at 410 (1958).

If there are any persons who have not been joined in this suit it is submitted that in fairness, the petitioner should have the same opportunity accorded them to join any other parties, not joined, as was done in *People of the State of California v. United States*, supra.

As has been pointed out by this Court on numerous occasions, a necessary party may be joined even though the case is on appeal in this Court and it is submitted that the refusal of the Court below to allow the joinder of other necessary parties, *if any there were*, is in direct conflict with the following decision of this Court:

"To dismiss the present petition and require the * * * plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration. * * *"

Mullaney v. Anderson, 342 U.S. 415, 417, 72 S. Ct. 428, 430 (1952), 96 L. Ed. 458.

- (d) **The Importance of Municipal Water Supply and the Interpretation of the Act of July 10, 1952 (66 Stat. 518, 560, Sec. 208 (a)) Is of Such Great Importance as to Deserve an Interpretation of This Act by This Court.**

The water supply of this country is continually dwindling, especially the water supply of cities. The United States through its reclamation and flood control projects has rights on most of the great rivers and water supplies of this country. Proper determination of the rights and streams may not be obtained unless the provisions of the Act of July 10, 1952 (66 Stat. 518, 560, Sec. 208 (a)) are availed of.

We feel it is of great importance to this country as a whole that this Court should interpret the rights given the states, municipalities and irrigation districts of this country to join the United States as a party under this action for a full determination of their water rights in various irrigation and flood control projects now under construction in the United States.

-
6. APPELLANTS SHOULD NOT BE ALLOWED FOR THE FIRST TIME ON A MOTION FOR REHEARING TO RAISE POINTS NOT DESIGNATED IN THEIR POINTS ON APPEAL NOR IN THEIR BRIEF ON APPEAL IN ACCORDANCE WITH RULE 75 (d), FEDERAL RULES OF CIVIL PROCEDURE (28 U.S.C. 75 (d)).

We will only touch upon this matter briefly.

These appellant irrigation districts, for the first time on their motion for re-hearing, and after having asked the Court to grant a physical solution, and after the Court had spent many months in the trial of the case in decreeing a physical solution, asked that they be dismissed from this action without costs. In event the lower Court should amend its decision in this regard we point out that in accordance with the decisions of this Court appellants may not raise new questions for the first time on a motion for re-hearing where such questions were not designated in their designation of record on appeal. (*Jesionowski v. Boston & M. R. R.* (1947), 329 U.S. 452, 67 S. Ct. 401, 91 L. Ed. 416, *Bennett v. Scofield*, 170 F.2d 887 (5th Cir. 1948).)

VII

CONCLUSION

Due to several important errors in the decision of the Court below, due to the importance of this case to one of the leading cities of the West, and due to the importance of the points involved in this petition to the fast dwindling water supplies of the nation's cities as a whole, we pray that this Petition for a Writ of Certiorari, directed to the Ninth Circuit Court of Appeals be granted.

Dated, Fresno, California,
December 2, 1961.

Respectfully submitted,

JOHN H. LAUTEN,

CLAUDE L. ROWE,

Attorneys for Petitioner.

(Appendix Follows.)

Appendix

United States Court of Appeals for the Ninth Circuit

No. 15,840

State of California, United States of
America, et al.,

Appellants,

vs.

Everett G. Rank, et al.,

Appellees.

March 31, 1961

Upon Appeals from the United States District Court for the Southern District of California, Northern Division.

Before Hamlin and Merrill, Circuit Judges, and Powell, District Judge

Merrill, Circuit Judge:

This case involves the Central Valley project, an important undertaking of the Bureau of Reclamation in California's Central Valley.

Suit was brought by these appellees in 1947 to enjoin Bureau officials from the impounding of water at Friant Dam on the San Joaquin River in contravention of the rights of appellees to the beneficial use of the waters of the San Joaquin below Friant. Since commencement of this suit by individual water users, the City of Fresno has intervened as a plaintiff also

asserting rights to San Joaquin waters.¹ We shall hereafter refer to appellees as plaintiffs.

By court order, in 1953, the United States, over its protest, was joined as a necessary party defendant and appears on this appeal as an appellant. In 1951, the State of California intervened and upon this appeal supports the position of the appellants. Also appearing as appellants are the irrigation districts which benefit from the operation of the Friant Dam by the Bureau. We shall hereafter refer to appellants as defendants.

This suit has finally reached this court upon the merits. The district court has granted the plaintiffs an injunction, their right to which is challenged by the defendants.² The issues upon appeal divide themselves into jurisdictional questions and those relating to the merits of the dispute.

The jurisdictional issues are presented by the contentions of the defendants that the United States is

¹Also intervening as plaintiff was the Tranquility Irrigation District. This court is now advised that the dispute between this irrigation district and the Bureau of Reclamation has been resolved by agreement and no longer constitutes an issue upon appeal.

²The opinion of the district court is to be found under the title of Rank v. (Krug) United States, 1950, 142 F. Supp. 1. Connected cases dealing with intermediate orders of the district court are: Rank v. Krug, 1950, 90 F. Supp. 773; United States v. United States District Court, 9 Cir., 1953, 206 F. 2d 303; California v. United States District Court, 9 Cir., 1954, 213 F. 2d 818; Rank v. United States, 1954, 16 F.R.D. 310; City of Fresno v. Edmonston, 1955, 131 F. Supp. 421. Also involving the Central Valley Project but not these litigants or their disputes are United States v. Gerlach Livestock Company, 1950, 339 U.S. 725, affirming the decision of the Court of Claims, 1948, 111 Court of Claims 1, 76 F. Supp. 87; Ivanhoe Irrigation District v. McCracken, 1958, 357 U.S. 275.

an indispensable party; that it has not consented to suit and has been improperly joined; that in its absence the district court was without jurisdiction to entertain the dispute with reference to the operation of the Friant Dam by the Bureau.

Upon the merits, the issue is whether it is permissible for these plaintiffs to interfere by injunction with the public use which the Central Valley project represents. More specific issues are presented by the contention of defendants that the water rights of the plaintiffs, to the extent to which they claim injury, have been taken by the United States through exercise of its power of eminent domain and that the remedy of the plaintiffs is to seek compensation in the Court of Claims.

I. The Facts, the Pleadings and the Decree.

California's Central Valley is an immense elongated bowl approximately four hundred miles in length and at its widest point approximately one hundred miles in width. It is bounded on the north by the Siskiyou Mountains, on the south by the Tehachapi Range, on the east by the Sierra Nevada and on the west by the Coast Range. It includes more than one-third of the State of California.

The northern half of this valley is known as the Sacramento Valley and is the valley of the Sacramento River. This river rises at Mount Shasta and flows south parallel to the Sierra, joining on its course the many great rivers rising in the northern portion of the Sierra.

The southern half of the Central Valley is known as the San Joaquin Valley and is the valley of the San Joaquin River. This river rises in the High Sierra south of Yosemite Valley. Its course at first is to the west. It emerges from the mountains at a point known as Friant, flows out on the floor of the valley and at a point known as Mendota changes to a northerly course. For the purpose of this opinion, we shall divide the San Joaquin into three segments: that to the east of Friant we shall call the "upper"; that between Friant and Mendota the "central"; that below Mendota the "lower".

These two great rivers, the Sacramento and the San Joaquin, flow toward each other to join near Stockton. In past centuries their combined flow escaped the valley through a cut in the Coast Range at Carquinez to empty into San Francisco Bay. Today the bay has invaded the valley and a substantial arm, Suisun Bay, lies to the east of Carquinez. It is into Suisun Bay, well within the Central Valley, that the Sacramento and San Joaquin now empty.

The Sacramento River, through its tremendous tributaries from the Sierra, develops a surplus of water. The San Joaquin, on the other hand, fails to produce sufficient water to enable the rich lands of its valley to realize their fertile potentialities. The Central Valley project attacks this problem. Originally projected by the State of California as part of the State Water Plan, it has, through congressional sanction and for lack of state funds, been undertaken by the Bureau of Reclamation. Its feasibility was reported to the

President by the Secretary of the Interior on November 26, 1935, pursuant to § 4 of the Act of June 25, 1910, 36 Stat. 835.

The project contemplates the impounding of the waters of the upper San Joaquin at Friant. To this end the United States has acquired, by assignment from the original applicants, applications to appropriate under state law over four million acre feet of water annually. The processing of these applications has been halted pending the outcome of this case.

For the lands of the lower San Joaquin, the project contemplates an exchange of waters from the Sacramento River. This is to be accomplished by pumping Sacramento River water, at a point on its delta near Tracy, into a canal—the Delta-Mendota Canal—which would carry it south to Mendota, where it would be pumped into the bed of the San Joaquin through the Mendota pool. The waters impounded at Friant would be diverted north and south through canals to irrigation districts desperately in need of supplemental water.

Thus the upper San Joaquin is to continue in its natural flow until impounded at Friant. The lower San Joaquin is to be supplied with Sacramento water. The case before us involves the central San Joaquin, the sixty-mile stretch between Friant and Mendota. Plaintiffs claim rights to San Joaquin water upon this segment of the river as owners of lands either riparian to the river or overlying subterranean reservoirs fed by the river. The United States has successfully negotiated contracts with many of the water

users on this stretch of the river. Plaintiffs are among those who have refused to enter into such contracts.

The water law of California, to which the Federal Reclamation Act of 1902 defers, § 8, 32 Stat. 390, 43 U.S.C. § 383³ has been extensively dealt with in the opinion of the district court. *Rank v. (Krug) United States*, 142 F. Supp. 1, 104-115, 161-165. We note that as distinguished from most western states California does with modifications recognize the common law doctrine of riparian rights. *Lux v. Haggin*, 69 Cal. 255, 10 P. 674. The riparian and (as to subterranean waters) the overlying land-owners have the paramount right to the use of the waters of a stream system. An appropriator of water may reach only that surplus which is not required by the riparian and overlying owners.

By constitutional amendment in 1928, the rights of riparian and overlying owners were limited to reasonable use and reasonable methods of diversion with no right to make wasteful use of water.⁴ In its dis-

³"That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws • • •."

⁴Article 14, § 3, of the California Constitution provides:

"The right to water in or to the use or flow of water in or from any natural stream or water course in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consist-

cussion of California water rights, the district court in its opinion, states at page 162:

"The California courts, confronted with the command of the 1928 constitutional amendment that water should not be wasted, and also with the guaranties of that amendment that existing water rights be preserved to the extent of their present and prospective reasonable and beneficial uses, evolved a type of decree which for the sake of convenience is called a 'physical solution.'

"In essence, such decree is but the conditional injunctive decree of a court of equity. Such decrees in California water rights cases are characteristic examples of the preservation by equity courts of the elements of flexibility and expansiveness so that new remedies may be invented or old ones modified in order to meet the requirements of every case and to satisfy the needs of every progressive social condition."

Further at pages 163-164, the opinion states:

"The matter of a physical solution becomes a practical problem which will vary with each case. That practical problem is best stated by the question—how can the utmost beneficial use be made of the waters of the particular stream without invading prior vested water rights? If those prior vested water rights can be preserved and satisfied by giving them the water to which they are entitled, and at the same time waste can be prevented by reasonable changes in natural physical characteristics, then, under the California de-

ently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses • • •."

cisions, the court may solve that problem by the use of its injunctive powers, conditioned upon making those physical changes. The parties seeking to make an appropriation or to take water, in derogation of prior vested rights, can be enjoined from taking water until those physical changes are made. The efforts of the courts of California in imposing conditional decrees of injunction requiring a physical solution have been to, as near as possible, satisfy the prior vested rights whether riparian or overlying, and at the same time make available, for appropriation and reasonable and beneficial use elsewhere, all water in excess of that required to satisfy those prior vested rights."

This suit was commenced September 25, 1947. Originally brought in the state courts, it was, on motion of the defendants, removed to the district court under 28 U.S.C. § 1441 (a). That removal was held proper. *Rank v. Krug*, 1950, *supra*, footnote 2.

The complaint of plaintiffs, in general effect, alleges that defendant officials of the Bureau of Reclamation through the construction and operation of Friant Dam, threaten to and are impounding and diverting water of the San Joaquin in disregard of plaintiff's rights to the use of such water. The complaint, as supplemented and amended, alleges that ever since the commencement of the project in 1935 defendant officials and their predecessors had repeatedly informed and assured plaintiffs that their water rights would not be taken or disturbed; that on July 15, 1947, they were advised by an official of the Bureau that, unless they either accepted an offer by the Bureau

for the "adjustment" of their water rights on terms fixed by the Bureau or filed suit for damages before October 20, 1947, their water rights would be taken without compensation.

The complaint prayed for an injunction against interference with their rights, or, in the alternative, that the court decree a physical solution to provide them with water to meet their rights.

This suit at the outset was recognized by all parties as one to secure a judicial determination of the extent of the vested water rights of the plaintiffs and of the conditions under which defendants, without adversely affecting those rights, might appropriate waters of the San Joaquin. Although the rights of the plaintiffs to the full natural flow of the river were disputed, it was conceded that they were entitled to a reasonable quantity of water and to put such water to use by reasonable methods of diversion.⁵

⁵Defendant officials, in their answer, stated that the plan of the Central Valley Project—

"• • • requires the Bureau of Reclamation to, and it will, recognize and respect existing water rights of all riparian owners, including such of the plaintiffs, if any, as are riparian owners, on the San Joaquin river between Friant Dam and Gravelly Ford, as they exist under the laws of the State of California and which have not heretofore been acquired or adjusted by the United States."

Further it is alleged:

"• • • that the authorized and declared plan of operation of the Central Valley Project will not deprive plaintiffs or any or either of them, or any other person, firm or entity, of their water rights as they exist under the laws of the State of California • • •"

The defendant officials in part prayed:

"4. That this Honorable Court determine that the lands found to be riparian to the said San Joaquin River shall be entitled to a reasonable quantity of water for beneficial use thereon for irrigation and domestic purposes, and that sufficient water be allowed

The nature of the dispute changed subsequently when, in answering the complaint in intervention of the City of Fresno, the defendants alleged:

"The United States of America through the exercise of its power of eminent domain has taken all rights to the use of water in the San Joaquin River which are required for the operation of Friant Dam and its appurtenant works, all com-

to flow in the San Joaquin River to furnish said riparian owners with said supply of water by the use of reasonable means of diversion from the said San Joaquin River by pumps, and further determine that channelization of the said San Joaquin River be made so as to reduce the quantity of water to be discharged from Friant Dam in order to supply said riparian lands with said quantity of water.

"5. That this Honorable Court determine and adjudge that a live stream shall be maintained at all times between Friant Dam and Gravelly Ford on said San Joaquin River, which said live stream shall at no time be required to be in excess of the natural flow of the San Joaquin River if Friant Dam were not constructed and in operation, which said live stream shall be for the purpose of supplying the said quantity of water for use upon lands riparian to said San Joaquin River and to supply the underground percolating waters for lands determined to be entitled to a recharge from the San Joaquin River for said underground waters.

"6. That this Honorable Court further determine that at no time a flow of greater than five second-feet need pass the downstream boundary of the lowest riparian owner upon said river between Friant Dam and Gravelly Ford."

The defendant irrigation districts and the State of California, as intervener, alleged in response to the complaint:

"That pursuant to Article XIV, Section 3 of the Constitution of the State, the plaintiffs cannot demand and the defendants cannot permit any wasteful or prodigal use of the water of the San Joaquin River. That the plaintiffs have no right to the whole flow of the San Joaquin River as alleged in paragraph IV of the complaint, nor do the plaintiffs have the right to any part of the flow of the river in excess of the amounts required to meet their reasonable needs for irrigation and domestic uses. That the plaintiffs have no right to insist on the uninterrupted use of their existing diversion devices and must submit to a physical solution whereby their reasonable needs and uses may be supplied; that this court has the power and duty of requiring a physical solution."

ponents of the Central Valley Project; that fee simple title to all the rights to the use of water required for the operation of the Central Valley Project has at all times since that taking resided in the United States of America."

From the outset the defendants have contended that the United States is an indispensable party without which the district court cannot entertain this suit upon the merits. On September 18, 1953, an order was made joining the United States as a party defendant. Save for moving to dismiss the action against it, the United States thereafter ignored this suit in the district court and a default judgment has been entered against it.

Following trial, the district court ruled that the vested rights of the plaintiffs in no respect had been acquired by the United States through exercise of its power of eminent domain. Upon trial, three plans of physical solution had been offered: one by the plaintiffs, one by the defendants and one by the State of California as intervenor. The district court rejected the last two plans as inadequate. It approved in principle the plan submitted by the plaintiffs and adopted it in part, reserving jurisdiction to modify its decree as experience might direct.

The decree entered June 20, 1957, enjoined the defendants from "impounding, or diverting or storing for diversion, or otherwise impeding or obstructing the full natural flow of the San Joaquin River." It was provided that this injunction should not go into effect should the United States or the defendant irrigation

districts place in operation, maintain and operate the prescribed physical solution.

The solution as decreed consisted of a series of ten ponds in the natural channel of the river created by ten collapsible check dams to be so operated as to provide releases of water sufficient to flush and scour the aquifers by which river water found its way to the underground reservoirs from which the claimants of overlying rights received their water. By this means it was felt that a flow of less than the full natural flow could simulate the full natural flow effectively. It was provided that a sufficient flow of water be released from Friant Dam to provide a minimum flow of five second feet over the last check dam downstream. Thus it was assured that the quantity of water released would, with a surplus of five second feet, be sufficient to meet the demands of all water users.

II. The Jurisdictional Issues.

We proceed to the jurisdictional questions presented by this appeal. The first question is presented by the contention of the United States that it has not consented to suit and has improperly been joined as a party defendant.

If consent to suit is to be found, it must be through the provisions of the waiver of immunity statute passed by Congress in 1952, which has come to be known as the "McCarran Amendment." 66 Stat. 560, 43 U.S.C. § 666. This statute provides in part:

"Consent is given to join the United States as a defendant in any suit (1) for the adjudication

of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit."

The question presented by the contention of the United States requires us to determine whether this suit can be regarded as one "for the adjudication of rights to the use of water of a river system" within the meaning of § 666.

There can be little doubt as to the type of suit Congress had in mind. It was not a private dispute between certain water users as to their conflicting rights to the use of waters of a stream system; rather, it was the quasi-public proceeding which in the law of western waters is known as a "general adjudication" of a stream system: one in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated.

With reference to this type of suit, the Senate Report upon the bill which became § 666 quoted as follows from *Pacific Live Stock Co. v. Oregon Water Board*, 1916, 241 U.S. 440, 447:

All claimants are required to appear and prove their claims: no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first, that the waters may be distributed, under public supervision, among the

lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities and uncertainties; and, third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators. S. Rep. No. 755, 82d Congress, 1st Session 5 (1951).

The Senate report also incorporated correspondence between Senators Magnuson and McCarran. The former was disturbed by the thought that private water disputes could, under the bill, interfere with reclamation projects in which he was interested. Senator McCarran wrote (S. Rep. No. 755, 82d Congress, 1st Session 9 (1951)):

"You indicate that you visualize the possibility of an individual or group, having water rights on that stream bringing suit to adjudicate their respective rights thereby preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending.

"S. 18 is not intended to be used * * * for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream."

In *Miller v. Jennings*, 5 Cir., 1957, 243 F.2d 157, 159, discussing the nature of the suit to which § 666 referred, the court stated:

"The United States has not given its consent to be joined as a defendant in every suit involving water rights. It may be made a party only in suits 'for the adjudication of rights to the use of water of a river system or other sources'. There can be an adjudication of rights with respect to the upper Rio Grande only in a proceeding where all persons who have rights are before the tribunal."

That opinion then quoted this court:

"The Ninth Circuit Court of Appeals has most succinctly stated the doctrine in this manner: 'The only proper method of adjudicating the rights on a stream, whether riparian or appropriative or mixed, is to have all owners of lands on the watershed and all appropriators who use water from the streams involved in another watershed in court at the same time.' *People of the State of California v. United States*, 9 Cir., 1956, 235 F.2d 647, 663."

The question remains whether the suit at bar was for such a general adjudication of a river system as was contemplated by Congress.

In two respects we feel that it has failed to measure up. First, all claimants have not been joined. Second, neither the relief prayed for nor the decree includes the establishment of the rights of the claimants as between themselves. The controversy thus is limited to a private one between the claimants on the one hand and the officers of the Bureau of Reclamation on the other.

The plaintiffs attempted to meet the problem of joinder by treating the suit as a class action under

Rule 23, F.R.C.P. In their amended complaint they asserted that they represented not only themselves but all others similarly situated. The district court ruled that the suit was a proper one for application of Rule 23, since "the character of the right sought to be enforced is a common right to water from a common source of supply * * *." *Rank v. United States*, supra, at page 155.

It may well be that those claiming riparian and overlying rights could properly be treated as a class, since the scope of their rights and the limitations imposed upon them by the physical solution decreed are dependent upon circumstances common to all. This suit, however, involves appropriative and prescriptive rights as well as riparian and overlying rights. In its decree the district court took note of the fact that certain of the plaintiffs individually claimed appropriative or prescriptive rights. In six instances the decree adjudicated the rights of these plaintiffs not as between themselves but as against the defendants. The decree expressly purports to adjudicate the rights of all who claim through appropriation or prescription as a class represented by the parties plaintiff.

These plaintiffs, as claimants of appropriative or prescriptive rights, cannot, however, speak for others "similarly situated." The extent of the rights of others must depend upon the circumstances of each individual case. As pointed out in *Miller v. Jennings*, supra, appropriative rights cannot be established by a class action. The claimants individually must be before the court.

With respect to the private nature of the controversy, the district court recognized that this was not a suit in which the water users sought to enforce their rights as among themselves or to have given amounts of water declared and adjudicated as their rights. *Rank v. United States*, supra, at pages 36, 105, 155. Nevertheless, since the suit required a judicial determination of rights to the use of waters of the San Joaquin, since such asserted rights were of the very essence of the suit and since their determination constituted the basic problem, the court ruled that the suit was such a one as to fall within the provisions of § 666. *Rank v. United States*, supra, at pages 72-73.

It may well be that a general adjudication would require no more specific adjudication as to riparian and overlying rights than that which was here entered. As to the appropriative and prescriptive rights, however, the decree only purports to establish the rights of these plaintiffs as against the defendants. No priority is established save only that the rights are prior to those claimed by the defendant officials on behalf of the United States. As between the claimants themselves, their respective priorities are not established.

For these reasons, the suit at bar falls short of being one for a general adjudication. It is not such a suit as is contemplated by § 666. Consent to suit has not been conferred by the United States under that statute. The district court was without jurisdiction to join the United States and the United States must be dismissed from this proceeding.

The second jurisdictional question is presented by the contentions of defendant officials that this is essentially a suit against the United States; that the United States is an indispensable party and that the district court had no jurisdiction to entertain the suit in the absence of a waiver of sovereign immunity. In this respect they rely upon *Larson v. Domestic and Foreign Commerce Corporation*, 1949, 337 U.S. 682.

The suit against a government official is the traditional remedy for one aggrieved by governmental action in cases where there has been no waiver of sovereign immunity and action against the United States therefore is not available. In *Ickes v. Fox*, 1937, 300 U.S. 82, the Supreme Court dealt with such an action in the field of water rights and there held the United States not to be indispensable. The district court carefully considered this problem in an earlier proceeding in this litigation. *Rank v. Krug*, 1950, *supra*, footnote 2, and there held *Ickes v. Fox* to be controlling.

The *Fox* case, as does the case before us, involved a project of the Bureau of Reclamation. The plaintiffs had asserted that under reclamation laws they had acquired vested rights to the use of water from a source under the control of the Secretary; that the Secretary threatened to withhold a substantial portion of water unless the plaintiffs agreed to pay certain sums for further improvements undertaken by the Bureau. The court, at page 97, quoted as follows from *Philadelphia Company v. Stimson*, 1912, 223 U.S. 605, 619:

"If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. * * * And in case of an injury threatened by his illegal action the officer cannot claim immunity from injunction process."

The court, in *Fox*, emphasized that the water rights of the plaintiffs had become vested and that the suit had been brought "to enjoin the Secretary of the Interior from enforcing an order the wrongful effect of which will be to deprive respondents of vested property rights * * *" (page 96). It held that under *Stimson* and other decisions of the court the suit was not one against the United States.

The nature of *Larson v. Domestic and Foreign Commerce Corporation*, supra, was, in that case, briefly stated by the court as follows, at page 684:

"The complaint alleged that the Administration had sold certain surplus coal to the plaintiff; that the Administrator refused to deliver the coal but, on the contrary, had entered into a new contract to sell it to others. The prayer was for an injunction prohibiting the Administrator from selling or delivering the coal to anyone other than the plaintiff and for a declaration that the sale to the plaintiff was valid and the sale to the second purchaser invalid."

The problem presented is stated at pages 687-688 as follows:

"* * * the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign. * * * The question becomes difficult and the area of controversy is entered when the suit is not one for damages but for specific relief: i.e., the recovery of specific property or monies or restraining the defendant officers' actions. In each such case the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign."

In dealing with this problem, the court stated at pages 689-690:

"* * * where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient. And, since the jurisdiction of the court to hear the case may depend, as we have recently recognized, upon the decision, which it ultimately reaches on the merits, it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies."

The court announced the rule at pages 701-702:

“* * * the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so ‘illegal’ as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.”

The court applied the rule to the facts, at page 703 as follows:

“The very basis of the respondent's action is that the Administrator was an officer of the Government, validly appointed to administer its sales program and therefore authorized to enter, through his subordinates, into a binding contract concerning the sale of the Government's coal. There is no allegation of any statutory limitation on his powers as a sales agent. In the absence of such a limitation he, like any other sales agent, had the power and the duty to construe such contracts and to refuse delivery in cases in which he believed that the contract terms had not been complied with. His action in so doing in this case was therefore, within his authority even if, for purposes of decision here, we assume that his construction was wrong and that title to the coal had, in fact, passed to the respondent under the contract. There is no claim that his action constituted an unconstitutional taking. It was, therefore, inescapably the action of the United States and the effort to enjoin it must fail as an effort to enjoin the United States.”

There can be little doubt that the opinion in *Larson* has limited the effect of *Ickes v. Fox* (as well as the many cases of like import discussed by Mr. Justice Frankfurter in his dissenting opinion in *Larson*, page 705 et seq.). Since *Larson* was handed down, courts have struggled with the problem of reconciliation. See Hart and Wechsler, *The Federal Courts and The Federal System*, page 1169 et seq.⁶

The task of reconciliation was undertaken, among other courts, by the Court of Appeals of the District of Columbia sitting en banc in *West Coast Exploration Co. v. McKay*, 1954, 213 F.2d 582.

That suit was brought to compel the Secretary of the Interior to issue a patent to a tract of land. The plaintiff asserted that the Secretary's refusal to do so was in violation of the Girard Act and constituted a substitution of the judgment of the Secretary for the will of Congress and thus was action beyond and in want of statutory power. The court ruled at page 594:

"Accepting the assertion for the preliminary jurisdictional purpose only, as true, the action is not one against the United States but one to compel the Secretary of the Interior, himself, to perform a clear legal duty. Therefore, the Secretary,

⁶The authors of that text, at page 1175, in discussing *Larson* and the earlier opinions upon which it bore, observed that:

"• • • historically the most plainly permissible of all types of actions against government officials, federal or state, are those in which (a) the plaintiff seeks to enjoin conduct or threatened conduct which, if not officially justified, would constitute a common law tort, and (b) the relief sought can be given by simply directing the defendant to abstain from what he is doing or threatening to do."

not the United States, is the necessary party defendant * * *."

The court distinguished the *Larson* case in the following language, at pages 594-595:

"In brief, the action or inaction questioned in the *Larson* case was that of War Assets in the exercise of its authority in disposing of surplus property of the Government and in negotiating and performing contracts for such disposal. It was not charged in the complaint that War Assets had acted beyond that authority or unconstitutionally."

It construed the ruling of the Supreme Court, in *Larson* as based upon the fact that the complaint there had "charged erroneous action on the part of War Assets *within* its authority and not conduct beyond the power of War Assets or of unconstitutional character" (Page 595).

The case at bar, we feel, is distinguishable from *Larson* upon the same ground as was *West Coast*. Here, as in *Fox*, we are dealing with vested rights to the use of waters with which, it has been determined, these defendant officials are interfering. This dispute, so far as the project is concerned, is external rather than internal; the rights involved are wholly independent of the project. The case thus is distinguishable from those concerned with the enforcement of rights to water developed by the project and in this respect is more clearly distinguishable even than *Fox* itself.

As we shall discuss later, the United States is expressly authorized by statute to acquire, by the exercise of its power of eminent domain, such water rights as are felt to be necessary to accomplish the purposes of the Central Valley project. As to rights not so acquired, the duty of the Bureau and of these defendants is to respect them. The Reclamation Act, § 8, 43 U.S.C. §383, expressly so requires. *Supra*, footnote 3. Certainly no authority can be found by expression or implication for the officers of the Bureau, as an alternative to acquisition of these rights, to impair their value by operating this project in disregard of them.

As we shall discuss later, the defendants contend that these rights have been acquired by the United States through exercise of its power of eminent domain. If such were the case, defendants would, in the operation of the project, have been acting within their statutory authority. *Ogden River Water Users Association v. Weber Basin Water Conservancy*, 10 Cir., 238 F.2d 936. Our ruling upon this contention, *infra*, is that these rights have not been acquired by the United States. Such being the case, these defendants, in disregarding and impairing the vested rights of these plaintiffs, were acting beyond their statutory authority. The United States is not then an indispensable party to this proceeding.

What we have here held applies to interference with the vested rights of these plaintiffs. Upon another and special phase of this case relating to the rights of the city of Fresno, the contentions of the defendants have merit.

Fresno, as an overlying landowner, has vested rights to underground waters from a source fed by the San Joaquin. It has alleged a need for additional water for municipal purposes and that applications to appropriate water from the San Joaquin have been made pursuant to the provisions of the California Water Code. The processing of these applications has been held up pending the outcome of this case. In the meantime, Fresno has requested the Bureau to deliver water to the city at such time as the city provides itself with the means for receiving such water at Friant. Fresno alleges that the monetary demands of these defendants for the supplying of such water are excessive. The district court so found. It ruled that Fresno was entitled to "a declaratory judgment that any charge for water which may be made by the United States should be reasonable." It specified that reasonableness required that such charge should be "no more than the irrigation districts (supplied by Friant) are charged from time to time for Class I water." *Rank v. United States*, supra, at page 185.

In negotiating and contracting for the delivery of water from Friant Dam, defendant officials were acting within the scope of their statutory authority and were carrying out the duties imposed upon them by their official positions. It is their administrative function to determine the rates at which water shall be delivered. It cannot be said that their statutory authority is limited to the making of such determination as the courts may find to be reasonable. The complaint of Fresno in this regard is a complaint against the

United States and this dispute may not be entertained judicially without a waiver of sovereign immunity on the part of the United States.

Fresno protests that it has a preferred right to supplemental water under California's County of Origin and Watershed of Origin statutes. California Water Code §§ 10505, 11460-63.⁷ The district court ruled that under these statutes the United States, prior to diverting San Joaquin water beyond the watershed or county of origin, must satisfy the needs of Fresno.

We may assume, without deciding, that these statutes apply to give Fresno a preferred position over defendant districts and over the United States as to the acquisition of appropriative rights. Fresno has, however, no vested right to command the services of the United States in receiving its waters. The terms

⁷Water Code § 10505:

"No priority under this part shall be released nor assignment made of any application that will, in the judgment of the commission, deprive the county in which the water covered by the application originates of any such water necessary for the development of the county."

Water Code § 11460:

"In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein."

Water Code § 11461:

"In no other way than by purchase or otherwise as provided in this part shall water rights of a watershed, area, or the inhabitants be impaired or curtailed by the department, but the

upon which the United States is willing to act in this respect remain an administrative decision which it is within the authority of the defendant officials to make.

As to that portion of the decree of the district court relating to the terms upon which Fresno is entitled to receive water from Friant Dam, the district court must be reversed.

The final jurisdictional contention of the defendants is that even though the United States may not itself be an indispensable party, the Secretary of the Interior is an indispensable superior officer and that the suit must therefore have been brought in the District of Columbia where service upon the Secretary might have been had. Their position in this respect is founded upon the proposition that by the decreed physical solution the court has required affirmative

provisions of this article shall be strictly limited to the acts and proceedings of the department, as such, and shall not apply to any persons or state agencies."

Water Code § 11462:

"The provisions of this article shall not be so construed as to create any new property rights other than against the department as provided in this part or to require the department to furnish to any person without adequate compensation therefor any water made available by the construction of any works by the department."

Water Code § 11463:

"In the construction and operation by the department of any project under the provisions of this part, no exchange of the water of any watershed or area for the water of any other watershed or area may be made by the department unless the water requirements of the watershed or area in which the exchange is made are first and at all times met and satisfied to the extent that the requirements would have been met were the exchange not made, and no right to the use of water shall be gained or lost by reason of any such exchange."

action of these defendants and the expenditure of public funds; that this is a matter which concerns the Secretary and that such a decree may not be imposed upon these defendants, who are wholly without authority to comply in the absence of approval by the Secretary. Defendants thus seek to escape *Hynes v. Grimes Packing*, 1949, 337 U. S. 86, and *Williams v. Fanning*, 1947, 332 U. S. 490, which lay down the rules that a superior officer is indispensable only if the relief granted will require him to take affirmative action.

This contention misconceives the nature of the decree of physical solution. The decree does not require anyone to take action; it is simply a declaration of a means whereby those seeking to appropriate waters of a stream may do so. The position of the United States in relation to waters of the San Joaquin is not simply that of a prospective condemnor. It is also an applicant for appropriative rights under California law. So far as this case is concerned, the decree of physical solution tells these defendants (and the Bureau) that by this means they may secure the right to divert waters of the San Joaquin (which otherwise are not available for appropriation) without the necessity for condemnation of vested rights. A right to diversion by the specified means can coexist with existing vested rights.

The decree of physical solution is not then a detriment imposed upon the Bureau. It is a grant of right to the Bureau and a detriment or limitation upon the rights of the plaintiffs to the full natural flow of the

river. The judgment of the Bureau to accept the physical solution or, in the alternative, to reject it and resort to condemnation remains available.

We conclude that while the United States may not be joined as party defendant the district court has jurisdiction to entertain this suit against the defendant officials so far as concerns the vested rights of these plaintiffs; that in such respect neither the United States nor the Secretary of the Interior is an indispensable party.

III. The Issues Upon the Merits.

We proceed to a consideration of the issues which this appeal presents upon the merits. These issues relate, in greater part, to the contentions of the defendants that the United States has acquired (or can by physical seizure acquire) the water rights of these plaintiffs through its power of eminent domain and that their remedy is not through injunction but through an action to recover compensation in the Court of Claims under the Tucker Act. 28 U. S. C. §§ 4346, 1491.

The first question is whether the United States can acquire these rights at all through eminent domain. For three reasons plaintiffs contend that it cannot.

First, plaintiffs contend that there is no legislative authority to acquire by eminent domain the water rights on this stretch of the San Joaquin. They assert that legislative history demonstrates that Congress understood that no rights on this stretch of the river would be taken; that the project would deal only with

such waters as the United States could secure by appropriation under state law or by purchase.

We cannot agree. The statutes expressly grant power to acquire such rights as may be required. Legislative history is consistent. Indeed, the project could not operate without impairing, to some degree, the full natural flow of the river. In *Ivanhoe Irrigation District v. McCracken*, supra, footnote 2, dealing with the Central Valley Project, the Supreme Court stated at page 291:

"If the rights held by the United States are insufficient, then it must acquire those necessary to carry on the projects * * *."

The City of Fresno contends that at least as to it there is no indication of congressional intent that its water rights should be subject to condemnation and thus become subordinated to irrigation purposes; that in absence of such an indication such an intent should not be presumed.

We cannot agree. The general congressional intent is clear: that where acquisition of property is necessary to permit the project to go forward, such property should be acquired. To require a showing that Congress had a particular piece of property in mind as a condition to governmental authority to condemn that piece of property would, in a project of this magnitude, wholly defeat the general congressional intent. If it be felt that in the public interest exceptions to the general authority to condemn should be made, these exceptions should be proposed to and made by Congress and not the courts.

What we have said applies as well to plaintiffs' second contention in this respect: that the only authority to condemn is as to wasteful uses of water such as those encountered in *United States v. Gerlach Livestock Co.*, supra, footnote 2. We find no justification for such a limitation upon the power of the United States to condemn.

The third contention of the plaintiffs is that California's County of Origin and Watershed of Origin statutes, supra, footnote 7 (which under § 8 of the Reclamation Act, supra, footnote 3, the United States is bound to respect), prevent diversion of waters of the San Joaquin beyond its watershed until the rights of these plaintiffs have been satisfied; that to condemn the rights of these plaintiffs for the purpose of such diversion is to disregard California law contrary to § 8.

Assuming, without deciding, that California law gives these plaintiffs a preference over the defendant districts and the United States as to rights to appropriate surplus waters, it does not follow that such preferred rights cannot be taken by the United States. While a state can bestow property rights on its citizens which the United States must respect, it cannot take from the United States the power to acquire those rights. Accord: *Ivanhoe Irrigation District v. McCracken*, 1958, supra; *Federal Power Commission v. Oregon*, 1954, 349 U. S. 435.

We conclude that the United States has the power to acquire the rights of these plaintiffs through exercise of eminent domain.

The next question is whether the United States may acquire these rights by physical seizure. Plaintiffs contend, and the district court ruled, that the only manner by which the power of eminent domain may be exercised upon the Central Valley Project is through a judicial proceeding in condemnation; that rights may not be acquired by physical seizure of inverse condemnation.

This contention is based upon language contained in § 7 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. § 421:

"That where in carrying out the provisions of this act it becomes necessary to acquire any rights, or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States *by purchase or by condemnation under judicial process*, and to pay from the reclamation funds the sums which may be needed for that purpose * * *." (emphasis supplied.)

The Supreme Court, however, has recognized this section as authorizing a taking by physical seizure. In *United States v. Buffalo Pitts Company*, 1913, 234 U. S. 228, 233, it was stated:

"Furthermore, the Government was authorized by § 7 * * * under which this improvement was being made to acquire any property necessary for the purpose and if need be to appropriate it."

Furthermore, in legislation specifically dealing with the Central Valley Project, Congress has used different and less restrictive language. The project was authorized and established under the provisions of the

Emergency Relief Appropriation Act of 1935, 49 Stat. 115, and the First Deficiency Appropriation Act, 1936, 49 Stat. 1622. By the Rivers and Harbors Act of 1937, 50 Stat. 850, the project was expressly reauthorized. There it is provided that the Secretary "*may acquire by proceedings in eminent domain or otherwise* all lands, rights-of-way, water rights or other property necessary for said purposes * * *." (Emphasis supplied.)

In our view, it cannot be said that Congress intended with respect to the Central Valley Project that exercise of the power of eminent domain was to be exclusively through judicial proceedings and that physical seizure and inverse condemnation were not to be available.

Our views are reinforced by the result in *Gerlach Livestock Company v. United States*, Court of Claims, 1948, affirmed in *United States v. Gerlach Livestock Company*, supra, footnote 2. It was recognized in that case that certain riparian rights on the lower San Joaquin had been acquired by the United States through seizure and it was held that the plaintiffs were entitled to compensation therefor. Further, in *Ivanhoe Irrigation District v. McCracken*, supra, at page 291, the Supreme Court recognized the power of the United States to acquire rights, paying compensation therefor, "either through condemnation or, if already taken, through action of the owners in the courts."

We conclude that the District Court was in error in ruling that the only means, other than purchase, by

which the United States may acquire title to water rights for the Central Valley Project is through judicial proceedings in condemnation.

Our rulings thus far have, we feel, reached the heart of this dispute. The United States, we have determined, has power to acquire the water rights in question and may do so by physical seizure. It may thus, by seizure, impose upon these plaintiffs the very restrictions and adjustments as to amounts and flows and methods of diversion that it sought to secure by contract, leaving the matter of compensation, in continued absence of agreement, to be fixed in the Court of Claims.

This does not dispose of the appeal, however. The defendants contend that the rights of the plaintiffs have already been seized. This contention requires consideration of the manner in which water rights may be taken by physical seizure.

Defendants first contend that plaintiffs' rights were seized in their entirety on October 20, 1941, upon which date the impounding of water at Friant Dam commenced. For this contention they rely heavily upon *Gerlach*, supra, as establishing the law with respect to this project. The Court of Claims there held, 1948, 111 Ct. Cl. 1, 87, 76 F.Supp. 87, 98, that taking by the United States of the rights there in question occurred not later than the specified date. Defendants insist that by that holding, affirmed by the Supreme Court, it has been established that on October 20, 1941, the rights of these plaintiffs were in their entirety seized by the United States through the action of the

defendants in commencing the impounding of water at Friant.

The rights in dispute in *Gerlach* were rights riparian to what was designated as "uncontrolled grasslands"—lands which were not irrigated but which secured their river water only through the uncontrolled flooding of the river at high stages. With reference to the time of the taking of these rights, the Court of Claims stated, Ct. Cl., *supra*, at page 80, F.Supp., *supra*, at page 97:

"That time, it would seem, comes whenever the defendant's intent to take has been definitely asserted and it begins to carry out that intent. So long as it is conjectural whether or not defendant will actually take plaintiff's property, a taking has not occurred, but when conjecture ripens into a definitely asserted purpose and steps are taken to carry out that purpose, the taking may be said to have occurred.

"In the case at bar there can be no doubt that the defendant intended to deprive plaintiffs of whatever water rights they had in their lands."

This is not the case with the rights of these plaintiffs. In *Gerlach* there could be no doubt but that flood waters would be captured at Friant in their entirety. There could be no dispute but that once impounding commenced the rights of uncontrolled grasslands to enjoy flood waters had been wholly taken. The enjoyment of these rights was completely inconsistent with project purposes from the very outset.

In the case before us, the operation of the dam is wholly consistent with a continuing recognition of the

rights of these plaintiffs to make reasonable use of the waters of the San Joaquin. The pleadings of these defendants, as we have heretofore quoted them, footnote 5, state that the Central Valley Project, as it is contemplated, will not deprive the plaintiffs of a reasonable use of water. These defendants prayed a decree determining that the riparian lands of the plaintiffs are entitled to receive water. Further, they prayed for a physical solution which would respect the continuing enjoyment of these rights.*

The defendants assert that legislative history and reports to Congress respecting the purpose and nature of the project demonstrate an intent that all water of the San Joaquin flowing at Friant would be impounded and diverted. They point to language in the feasibility report (set forth as a supplement to *Rank*

*The district court was undoubtedly disturbed by apparent inconsistencies in the position taken by the Secretary from time to time as this litigation progressed. On March 30, 1953, in response to a request from the district judge that the Secretary clarify his position, a letter was written by the Secretary to the Attorney General expressing his "administrative intent with respect to the operation of the Central Valley project insofar as it relates to the Friant-to-Gravelly Ford reach of the San Joaquin River." Here again it is specified that:

"... the Department will release from Friant Reservoir into the bed of the river a sufficient quantity of water (1) to meet all valid legal requirements for the reasonable and beneficial use of water, both surface and underground, by reasonable methods of diversion and reasonable methods of use in that area, and (2) to provide, in addition thereto, a continuous live stream flowing at a rate of not less than five cubic feet per second at specified control points throughout the Friant-to-Gravelly Ford area, the last one to be at a point approximately one-half mile below the head of the Gravelly Ford Canal."

Later, however, it is stated by the Secretary:

"I want to emphasize that the foregoing plan of operation of Friant Dam and Reservoir is an administrative one, voluntarily assumed and voluntarily to be executed."

v. *Krug*, D.C.S.D. Cal., 1950, 90 F.Supp. 773, 824) to the effect that the project would permit "*the entire flow* of the San Joaquin River to be regulated in Friant Reservoir * * * and to be utilized in the southern San Joaquin Valley * * *." (Emphasis supplied.) They point to Finding No. 35 of the Court of Claims in the *Gerlach* case:

"Defendant's plan, as modified, contemplated that the United States should eventually store and divert to non-riparian use all the waters of the San Joaquin River flowing at Friant, except for occasional spills."

They point to language of the Supreme Court in *Gerlach*, at page 729:

"A cost of refreshing this great expanse of semi-arid land (that supplied with project water by the United States from Friant) is that, except for occasional spills, only a dry riverbed will cross the plain below the dam."

The fact is, however, that the river below Friant will not be dried up. The United States is under a contractual obligation to numerous landowners to maintain a live stream. The United States has not then by the construction of the dam and the impounding of waters seized in their entirety the rights of these plaintiffs.

Appellants next contend that the rights of these plaintiffs have been taken by the manner in which the dam has been operated. This taking, ~~they~~ assert, was a partial taking: a taking to the extent that injury has been sustained.

While the river will not be dried up below Friant, there is no doubt that the project from the outset contemplated that the full natural flow would no longer pass Friant. There is no question but that the manner in which the dam has been operated by the Bureau has not permitted such flow. By operation of the dam, then, defendants may, indeed, have seized the physical corpus of waters which plaintiffs have a right to put to use. The question is whether such a taking, assuming it have occurred, constitutes a seizure of the water rights of these plaintiffs or, on the other hand, constitutes mere trespass upon them.

The peculiar characteristics of a water right as property are such as to demonstrate that seizure of such a right requires something more of a condemnor than would be necessary in the seizure of other types of property. This case is thus distinguishable from *United States v. Dow*, 1958, 357 U.S. 17, and *Hurley v. Kincaid*, 1932, 285 U.S. 95.

Plaintiffs' rights give them no title to the corpus of the water. The rights are usufructuary; they are rights to the use of water only. An isolated instance in which a certain amount of water has been taken would, of course, constitute a taking of the right to the use of that water by another. However, it would not necessarily constitute any attack upon that person's right to a continuing flow in a specified amount and to put water in a specified amount to beneficial use in the future. By virtue of the peculiar nature of the water right as property, a seizure of such right has important prospective as well as retrospective as-

pects. It does not relate solely to what has been taken in the past or is being taken in the present. It relates as well to the right to receive in the future. A condemnor cannot seize by saying only: "I hereby take X gallons of water." To effect a seizure of water rights, he must by word or action unequivocally say: "I hereby take your right to receive X gallons in the future."⁹

To illustrate the equivocal character of a taking of water, standing alone, we may suppose a case in which A has a right to 100 inches and the government during the month of August so regulates the flow of the source that A received only 90 inches, the balance being diverted by the government to its own use. What was the situation when this taking commenced? (1) Had A's right been seized in its entirety; or (2) had it been seized to the extent of 10 inches with the result that thereafter A had a right to receive only 90 inches; or (3) had it been seized to the extent of 10 inches in August, reverting to 100 inches in September?

If one's sole remedy for such a "taking" is to be an action for compensation in the Court of Claims, he must know what of his right has been taken: as to amounts, as to flows, as to methods of diversion. And he must have this knowledge not after the fact but at the

⁹"The damages claimed for diversion of a natural stream must be for the injury to plaintiff's enterprise consequent to the loss of the flow and the use of the water, not for the value of the water at so much per inch or gallon, since plaintiff does not own the corpus of the water, but a usufruct." 1 *Wiel, Water Rights in the Western States* (3d Ed.), 1912 at page 699.

time the interference occurs. Otherwise, the interference is more consistent with a transitory trespass upon his water rights than with a physical seizure of them. If, in the hypothetical case, the government on August 1 had no plan other than to take, day by day, whatever it felt was necessary, there would have been no seizure of water rights. There would, it is true, have been a taking of property as to which A had the right of use. There would have been compensable damage as to such taking. The water right would remain, however. While an isolated instance of a taking of water would not reflect upon a user's water right, still the taking can progress to a point where the right becomes clouded by apparent challenge. A casual day by day taking under these circumstances constitutes day to day trespass upon the water rights.

That there is a remedy in damages for such interference after the fact of the interference is not sufficient. The cloud cast prospectively on the water right by the assertion of a power to take creates a present injury above what has been suffered by the interference itself—a present loss in property value which cannot be compensated until it can be measured. Whether this trespass sounds in tort or is, as to the compensable injury, an actual taking of property is, we feel, an academic question not material to this case. In either event, the act is prospective impairment of the water right for which there is no remedy by compensation.

In an exercise of its power of eminent domain, then, the United States must commit itself as to what is

taken and as to what remains untaken. That which remains untaken and continues vested in the owner, the officers of the United States must continue to respect.

In the case at bar, the operation of Friant Dam was not of such a character as to notify these plaintiffs as to the extent of the seizure of their rights. Nor was it accompanied by any sufficiently definite uttered or written notification.¹⁰

We conclude that the water rights of these plaintiffs have not been acquired by the United States through exercise of its power of eminent domain.

Our ruling in this respect and the reasons stated therefor dispose as well of defendants' contention that certain of these plaintiffs have waived their rights to injunction and to deny a seizure of their water rights by having already filed actions under the Tucker Act to recover for damages already incurred. The contention that they have incurred compensable injury from acts of the defendants is not inconsistent with a con-

¹⁰Defendants assert that plaintiffs had ample notice through the manner in which Friant Dam was operated after July 1, 1953. Prior to that date the operation of the dam had been controlled by court order requiring release of at least 400 cubic feet per second. Upon lifting of this order, the flow was cut. The record shows a flow of 170 cubic feet per second in June, 1954; of 125 in September, 1954; of 145 in June, 1955; of 133 in September, 1955. Defendants assert that this manner of operation together with the statement of administrative intent contained in the Secretary's letter of March 30, 1953, to the Attorney General (see footnote 8), was sufficient to notify plaintiffs as to what portion of their rights was being taken.

We cannot agree. Without more specific commitment on the part of the Secretary, we cannot see how these plaintiffs could possibly anticipate what would occur next.

tention that their water rights have not been seized and must be respected.

Finally, defendants contend that, apart from all questions of eminent domain, it should not be available to these plaintiffs to interfere by injunction with the public use which the Central Valley Project represents. They protest in effect: "A claim for damages we can meet, but we cannot live with an injunction." They quote from the Supreme Court in *Larson, supra*, at page 704, as follows:

"* * * it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right."

The question is as to the extent of freedom which the Bureau should enjoy in operating Friant Dam for project purposes. We are concerned here with a balancing of the public interest which this project represents and the private interests represented by these plaintiffs. We cannot say that the district court was in error in determining the balance to fall in favor of the plaintiffs.

Others have, in operations of this sort, lived successfully with such an injunction as this. The com-

pulsion to respect vested rights has not been felt to halt such projects in their tracks. If defendants are right in their contentions, then Friant Dam can be operated without regard to the rights of those downstream (save the right to compensation after the fact of injury) and at the whim and caprice of Bureau officials giving full consideration only to those to whom they sell project water. Any respect accorded to the rights or needs of those downstream would, as the Secretary stated in his letter to the Attorney General, *supra*, footnote 8, be voluntarily assumed and voluntarily executed.

The question is whether these plaintiffs should be required to live with such free governmental control. A water right with no assurance of its peaceful enjoyment is worth little to a farmer whose very existence is dependent upon the predictability of his future water supply. For this reason the injunction is one of the traditional forms taken for the judicial establishment of water rights.

Defendants protest that for the district court to impose upon them the court's physical solution is for the court to substitute its judgment for that of the Bureau contrary to congressional intent in establishing the project. They assert that we should not tolerate such judicial intrusion into this specialized executive area.

We have already pointed out that defendants misconceive the nature of the physical solution. Their right to substitute their own solution and proceed in accordance with their own plans is still available to

them provided the necessities for acquisition by eminent domain are met as to this now judicially established right.

To summarize: These plaintiffs are not attempting, through the device of an action against these officials, to get back from the United States something that has been taken from them or to compel the United States to do something for their benefit or (as in *Hurley v. Kincaid*, 1931, 285 U.S. 95) to enjoin the United States from exercising its power of eminent domain. The decree simply tells these officials that until the rights of the plaintiffs have been acquired by the United States, it is the statutory duty of these officials in the operation of Friant Dam to respect those rights.

Defendants protest that even though an injunction be proper, there is no occasion to require the full natural flow of the river; that their operations of Friant Dam demonstrate that the riparian owners can comfortably get along on less. This may be so as to the riparian owners. There is evidence, however, that Fresno's rights cannot be met save by the full natural flow or an adequate simulation of such flow.

We conclude that the district court should not be reversed as to the injunctive aspect of its decree.

IV. Decision.

Save in the respects here specified, the judgment of the district court is affirmed. As to the joinder of the United States the district court is reversed. As to the rights of the City of Fresno, the district court is re-

versed in the respect specified in our opinion. This matter is remanded with instructions that the United States be dismissed as defendant and that the decree of the district court be vacated and set aside insofar as it relates to the terms upon which the City of Fresno is entitled to receive water from the United States at Friant Dam. Each party will bear its respective costs incurred on this appeal.

(Endorsed) Opinion Filed March 31, 1961.

Frank H. Schmid, Clerk.

United States Court of Appeals for the Ninth Circuit

No. 15840

State of California, United States of
America, et al.,

Appellants,

v.

Everett G. Rank, et al.,

Appellees.

Appeal from the United States District Court for the Southern District of California, Northern Division.

This Cause came on to be heard on the Transcript of Record from the United States District Court for the Southern District of California, Northern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed save in the respects here specified, as to joinder of the United States the District Court is reversed, as to the rights of the City of Fresno, the District Court is reversed as to that portion of the decree relating to the terms upon which Fresno is entitled to receive water from Friant Dam, and this matter is remanded to the said District Court with instructions that the United States be dismissed as de-

fendant, and that the said decree be vacated and set aside insofar as it relates to the terms upon which the City of F(r)esno is entitled to receive water from the United States at Friant Dam; each party will bear its respective costs incurred on this appeal.

(Endorsed) Judgment Filed and entered March 31, 1961.

Frank H. Schmid, Clerk.

United States Court of Appeals for the Ninth Circuit

No. 15840

State of California, United States of
America, et al.,

Appellants,

v.

Everett G. Rank, et al.,

Appellees.

Aug. 14, 1961

Before HAMLIN and MERRILL, Circuit Judges, and
POWELL, District Judge

Upon petitions for rehearing filed herein by the
State of California, the City of Fresno and the San
Joaquin Municipal Utility District,

IT IS ORDERED:

(1) The opinion heretofore filed herein is corrected in the following respects:

(a) The following language is stricken from page 4 of the slip-sheet opinion as printed by this court at the end of the first full paragraph: "The processing of these applications has been halted pending the outcome of this case."

(b) The following language is stricken from the third full subparagraph on page 18 of the

opinion: "The processing of these applications has been held up pending the outcome of this case."

(c) The following is added to footnote 7, page 19, of the opinion:

Water Code § 11463:

"Limitations. The limitations prescribed in Section 11460 and 11463 shall also apply to any agency of the State or Federal Government which shall undertake the construction or operation of the project, or any unit thereof, including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object contemplated by this part."

(2) The petition of the City of Fresno is denied.

(3) The petition of the State of California is granted. Briefs shall be filed within the times prescribed by Rule 18 of the Rules of this court, including an opening brief by petitioner unless it elects to stand upon its petition and waive further opening statement.

(4) The petition of San Joaquin Municipal Utility District is granted subject to the same provision with reference to briefs.

(Endorsed) Order on Rehearing Filed Aug. 14, 1961.

Frank H. Schmid, Clerk.

United States Court of Appeals for the Ninth Circuit

No. 15840

State of California, United States of
America, et al.,

Appellants,

v.

Everett G. Rank, et al.,

Appellees.

August 14, 1961

Upon Petition for Rehearing

Before HAMLIN and MERRILL, Circuit Judges, and

POWELL, District Judge

MERRILL, Circuit Judge

The City of Fresno has petitioned this court for rehearing. By order entered this day rehearing has been denied. In two respects, however, we feel that an opinion may serve a clarifying purpose.

I

Fresno asks that this court require the trial court to bring in as additional parties those holders of prescriptive or appropriative rights not now joined and points out in support that in excess of one million dollars has already been expended in the trial of the present action.

It is not clear to us what purpose would be accomplished by such joinder. It would not, standing alone, as we discussed in our opinion, convert this action into a general adjudication of a stream system. We decline to enter such an order.

We do appreciate the fact that much time, effort and cost have been expended on this litigation and that the disputes have expanded far beyond the original issues. It is quite possible that further useful ends can be served by this proceeding from time to time in the adjudication of specific rights or otherwise. If so, the continuing jurisdiction of the district court may provide a forum for consideration of such new matter and it is not our present purpose anticipatorily to limit the jurisdiction of the district court in any such respect. So far as concerns the issues of this appeal, however, we find no occasion to delay our judgment pending any further district court consideration.

II

Fresno has again, and vigorously, presented its contention that California's county and watershed of origin statutes are, under § 8 of the Reclamation Act, binding upon the United States and preclude the diversion by these defendants of water of which Fresno has present need.

It would appear either that we do not understand what it is that Fresno seeks in this respect or that Fresno does not appreciate the distinction we draw between vested rights to natural flow and rights to

project water: Hence the following elaboration upon our opinion.

It may well be that Fresno, under California law, has preferred rights to additional natural flow. If and when such rights have been established in accordance with state law, Fresno may be able effectively to protest the impounding of waters by these defendants in contravention of such rights. But this is speculation upon future events and future issues and decision must await the occurrence and the dispute.

The judgment of the district court, which we reversed in this respect and to which Fresno's petition for rehearing is directed, did not appear to relate to Fresno's right to natural flow, however. It appeared to relate to Fresno's right to project water. If Fresno is to have such water or is to enjoy the benefits of Friant storage or the delivery service of the United States, the terms upon which it may do so are not (for the reasons expressed in our opinion) appropriate issues in this section against the individual officers of the bureau.

(Endorsed) Order on Rehearing Filed Aug. 14, 1961.

Frank H. Schmid, Clerk.

The Secretary of the Interior
Washington

November 26, 1935

"The President
The White House

"My Dear Mr. President:

"The Supreme Court of the United States in the Parker Dam decision *United States v. State of Arizona*, 295 U. S. 174, 55 S. CT. 666, 79 L. Ed. 1371 indicated that Section 4 of the Act of June 25, 1910 (36 Stat. 835), is applicable to irrigation projects constructed under the National Industrial Recovery Act and this report on the Central Valley project, California, is made to you under said statute of 1910 and under subsection B of Section 4 of the Act of December 5, 1924 (43 Stat. 702).

"Section 4 of the Act of June 25, 1910 (36 Stat. 835), provides, in effect, that after the date of that act no irrigation project to be constructed under the Act of June 17, 1902, (32 Stat. 388), and acts amendatory thereof or supplementary thereto, shall have been recommended by the Secretary of the Interior and approved by the direct order of the President.

"Subsection B, Section 4, Act of December 5, 1924 (43 Stat. 702) provides as follows:

" "That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construc-

tion, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States.'

"GENERAL DESCRIPTION OF PROJECT

"The Central Valley project embodies a plan for the conservation, regulation, distribution and utilization of the water resources of the Sacramento and San Joaquin rivers to provide urgently needed water supplies for existing agricultural, industrial and municipal developments in the Sacramento and San Joaquin valleys and upper San Francisco Bay region which contain 3,000,000 acres of settled, irrigated and productive land, and a population of 90,000 persons. In addition to providing new water supplies to meet serious problems of water shortage, the project contemplates the restoration of commercial navigation on the upper Sacramento River, increased flood protection for the valley lands, and incidentally the generation of about a billion and a half kilowatt hours annually of hydroelectric energy.

"The key unit of the project is Kennett Reservoir on the Sacramento River. A dam 420 feet high will regulate floods and store three million acre-feet of water. Water released from the reservoir, after generating hydroelectric power, will flow down the Sacramento River, maintaining adequate depths for navi-

gation and furnishing ample supplies for irrigation and municipal and industrial use along the main river and in the fertile delta region of the Sacramento and San Joaquin Rivers. Intrusion of salt water from the bay into the delta channels—a frequent occurrence in recent years causing substantial loss in crops and threatening destruction of productivity—will be prevented by the released waters. In addition water supplies will be made available in the delta channels for various uses in the nearby upper San Francisco Bay area, and for utilization in the San Joaquin Valley. Conduits to carry the supplies to these areas are provided. The supply for the San Joaquin Valley will be conveyed up the San Joaquin River through a series of pumping plants and intervening natural and artificial channels a distance of 150 miles lifting the water to an elevation of 160 feet above sea level. This water will replace San Joaquin River water now used for irrigation in the northern San Joaquin Valley, thus permitting the entire flow of the San Joaquin River to be regulated in Friant Reservoir—the second storage unit of the project—and to be utilized in the southern San Joaquin Valley where local supplies are deficient. Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve developed irrigated lands in an area extending from Madera County on the north to Kern County on the south.

“The cost of the project, estimated at \$170,000,000, will be met by revenues from the sale of water and power.

"WATER SUPPLY

"The sources of water supply for the project are the Sacramento and San Joaquin Rivers and their tributaries. The State of California, pursuant to acts of the State Legislature has filed notices of appropriation on the principal streams, which are in good standing. Water supplies studies made by the Department of Public Works of California, U. S. War Department and the U. S. Bureau of Reclamation, indicate on the basis of available data that the works of the project will provide an adequate water supply for all purposes.

"ENGINEERING FEATURES

"The principal engineering features of the project are as follows:

"Kennett Dam Unit—the Kennett reservoir, the key unit of the project, is located in the Sacramento River near Redding in Shasta County. The dam will be 420 feet high and store 3,000,000 acre-feet of water. A 175,000 k. v. a. power plant will be located below the dam. A regulating afterbay with a 50,000 k. v. a. power plant will be constructed below the Kennett Dam. From the power plants a 200 mile power transmission line will extend to a main distributing substation near Antioch or Suisun Bay.

"Contra Costa Conduit—A canal, capacity 120 second feet, with pumping plants, will extend westerly from the San Joaquin delta for 50 miles through Contra Costa County to supply municipal, industrial and agricultural water requirements.

“San Joaquin Pumping System—The works for this pumping system will comprise a dam and other works in Sacramento delta to divert stored water from Kennett reservoir through a channel into San Joaquin delta for salinity control, irrigation and other purposes; dredging of existing channels in the San Joaquin delta; five dams and pumping plants on San Joaquin River to mouth of Merced River; and four pumping plants and 65 miles of canal on the westerly side of San Joaquin Valley which will deliver water to Mendota Weir on San Joaquin River, elevation 160 feet. These works will be capable of furnishing a substituted supply of 1,000,000 acre-feet to 285,000 acres of land now irrigated from San Joaquin River.

“Friant Reservoir—A dam, 250 feet high, will be constructed on San Joaquin River, which will store 400,000 acre-feet of water which will permit the diversion of San Joaquin River water southward at elevation 467 feet. One and one-half million acre-feet annually on the average will be available for transmission from the reservoir through means of the San Joaquin River Pumping System and the purchase of water rights in the San Joaquin River.

“Friant-Kern Canal—The Friant-Kern Canal will extend from Friant Reservoir to Kern River, a distance of 157 miles and will be capable of serving an area of 1,000,000 acres of developed land.

“Madera Canal—The Madera Canal, maximum capacity 1500 second-feet, will extend from Friant reservoir to Chowebilla River, a distance of 35 miles and will be capable of furnishing irrigation water to an area of 140,000 acres.

"ESTIMATED COST OF PROJECT

Kennett dam, reservoir and power plants	\$ 84,000,000
Kennett transmission line and sub-station	14,000,000
Contra Costa Conduit	2,500,000
San Joaquin Pumping System	19,000,000
Friant dam and reservoir	14,000,000
Friant-Kern Canal	26,000,000
Madera Canal	3,000,000
Rights of way, water rights and general expenses	8,000,000
TOTAL	\$170,000,000

"First Year Construction Program.

"Under date of September 10, 1935, you approved an allocation of \$20,000,000 for the Central Valley Project, which amount was later reduced to \$15,000,000. Construction on the following units is recommended for the first year:

"Kennett Reservoir Unit Contra Costa Conduit"
Friant Dam and Canals.

"An amount of \$15,000,000' can be efficiently and economically expended on the foregoing units during the first year of construction.

"Adaptability of Land for Irrigation,

"CROP PRODUCTION AND SETTLEMENT

"The climate is favorable and the soil, if water is available, is adaptable to the production of a wide

variety of crops. The principal crops now raised in the San Joaquin Valley are citrus and deciduous fruits, grapes, alfalfa, cotton, nuts and figs; in the Delta, asparagus, celery, potatoes as well as deciduous fruits; and in the Sacramento Valley there is a heavy production of rice in addition to other grains and deciduous fruits.

"The valley is highly developed. The lands are of high value and produce large returns. With an attractive climate, fertile soil and stable markets, water is the one remaining necessity to prosperous, successful agricultural industry. It has been highly successful and supports a large farm population. Much of the fruit is shipped to eastern markets but many other items, such as the products of dairying, are marketed within the state and reduce the quantities, imported into the state. Products are largely non-competitive with other sections of the country, since many of them, such as nuts, figs, raisins, asparagus are produced almost wholly in California.

"Transportation facilities are excellent. These include railroads and improved highways leading to the Metropolitan center of Los Angeles and San Francisco and to eastern markets.

"The project is not designed for bringing new lands into cultivation, but for the maintenance of existing agricultural development and existing civilization of a high type. Any increase in irrigated land will be small and will come into being slowly over a long period of time. Part of the water supply is to be obtained by the purchase of water now used for the irri-

gation of pasture lands and this will result in the retirement from use of 250,000 acres of submarginal land, as compared to a small and gradual increase of irrigated land.

“SOCIAL AND ECONOMIC VALUES.

“The economic values of the project are of great magnitude. The project will not bring into production new agricultural areas but will maintain present values and civilization. Of the 3,000,000 acres now irrigated, 1,000,000 face acute water shortage, and abandonment is proceeding rapidly. The values in jeopardy are large, as without water, not only will lands dry up but communities will vanish and whole sections return to desert, as is now occurring in the San Joaquin Valley. A share of the loss will be suffered by persons not residing in the areas directly affected.

“Control of salinity in the delta of the two rivers near Sacramento is part of the agricultural maintenance phase of the project. Here 400,000 irrigated acres with an annual crop value of \$30,000,000 are menaced by salt water from upper San Francisco Bay. Some abandonment has occurred and the whole area is endangered. In this same general area is a large industrial section which is also short of water by reason of increasing salinity. Here 100 industrial plants produce annually \$100,000,000 value of manufactured products, and while not facing extinction, are suffering damage and expense from lack of water.

“Navigation on the Sacramento River, one of the important waterways of the nation, has been greatly

damaged by low water, navigation having been practically abandoned above Sacramento in the summer season. The national navigation and flood values of the project have been found by the War Department to be \$12,000,000, and the recently enacted Rivers and Harbors Bill (Public No. 409, 74th Congress), by reference to the War Department report approves the project and authorizes the appropriation of \$12,000,000 for it.

"A large power house at the main storage dam will produce nearly a billion and a half kilowatt hours of electric energy annually, which will be sold at less than existing rates, thereby benefiting power users and at the same time producing a large revenue, which will go toward the repayment of the construction costs.

"PROBABLE RETURN TO RECLAMATION FUND OF COST OF CONSTRUCTION.

"The next declaration required is that the cost of construction will probably be returned to the Federal Government. This is interpreted to mean that it will be returned within forty years from the time the Secretary issues public notice that water is available from the project works. The estimated cost of construction is \$170,000,000 and the annual cost, including repayment of all other charges is \$7,500,000. It is estimated that annual revenues from the sale of water and of electric power will be sufficient to cover these charges. The favorable conditions heretofore recited justify the belief that the project will return its cost.

"I find that the project is feasible from engineering, agricultural and financial standpoints, that it is adaptable for settlement and farm homes, that the estimated construction cost is adequate and that the anticipated revenues will be sufficient to return the cost to the United States.

"The Commissioner of Reclamation has approved and recommended the construction of the project. I therefore recommend the approval of the Central Valley development as a Federal reclamation project.

"Sincerely yours,

"(Sgd.) Harold L. Ickes,

"Secretary of the Interior.

"Approved: Dec. 2, 1935.

"Franklin D. Roosevelt.

"President."

"Sec. 2. That the \$12,000,000 recommended for expenditure for a part of the Central Valley project, California, in accordance with the plans set forth in Rivers and Harbors Committee Document Numbered 35, Seventy-third Congress, and adopted and authorized by the provisions of section 1 of the Act of August 30, 1935 (49 Stat. 1028 at 1038), entitled 'An Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,' shall, when appropriated, be available for expenditure in accordance with the said plans by the Secretary of the Interior instead of the Secretary of War: *Provided*, That the transfer of authority from the Secretary of War to the Secretary

of the Interior shall not render the expenditure of this fund reimbursable under the reclamation law: *Provided further*, That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purpose of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes: *Provided further*, That, except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project, and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with State agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law, and may acquire by proceedings in em-

inent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes: *And provided further*, That the said dam and reservoirs shall be used, first for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and, third, for power.

Act of August 26, 1937 (50 Stat. 844, 850)

“Subsec. B. That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States.”

Act of December 5, 1924 (43 Stat. 672, 702, Section 4, Subsec. B.)

“Sec. 2. Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the use of water in accord with State water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future needs.”

Act of October 13, 14, 1949 (63 Stat. 852, 853)

"Sec. 208. (a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit."

Act of July 10, 1952 (66 Stat. 518, 560, Sec. 208 (a).)

"Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder; and the Secretary of the Interior, in carrying out the provisions of this Act shall proceed in conformity with such laws. * * *"

Act of June 17, 1902 (32 Stat. 388, 390; 43 U. S. C. 391)

"State use and control of water. It is hereby declared that the people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection. (Stats. 1943, c. 368, p. 1606, Section 104.)"

California Water Code Section 104

"Highest uses of water; domestic; irrigation. It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation. (Stats. 1943, c. 368, p. 1606, Section 106.)"

California Water Code Section 106

"Municipal priority. The application for a permit by a municipality for the use of water for the municipality or the inhabitants thereof for domestic purposes shall be considered first in right, irrespective of whether it is first in time. (Stats. 1943, c. 368, p. 1623, Section 1460.)"

California Water Code Section 1460

"Applications; filing; formalities; priority; diligence. The Department of Finance shall make and file applications for any water which in its judgment is or may be required in the development and completion of the whole or any part of a general or coordinated plan looking toward the development, utilization, or conservation of the water resources of the State.

Any application filed pursuant to this part shall be made and filed pursuant to Part 2 of Division 2 of this code and the rules and regulations of the State Engineer relating to the appropriation of water insofar as applicable thereto.

Applications filed pursuant to this part shall have priority, as of the date of filing, over any application made and filed subsequent thereto. Until October 1, 1959, or such later date as may be prescribed by further legislative enactment, the statutory requirements of said Part 2 of Division 2 relating to diligence shall not apply to applications filed under this part, except as otherwise provided in Section 10504. (Added Stats. 1943, c. 370, p. 1896, as amended Stats. 1953, c. 1522, p. 3184, Section 1; Stats. 1955, c. 1248, p. 2282, Section 1.)"

California Water Code Section 10500

"*Release and assignment of priority; assignee defined.* The Department of Finance may release from priority or assign any portion of any appropriation filed by it under this part when the release or assignment is for the purpose of development not in conflict with such general or coordinated plan. The assignee of any such application, whether heretofore or hereafter assigned, is subject to all the requirements of diligence as provided in Part 2 of Division 2 of this code. 'Assignee' as used herein includes, but is not limited to, state agencies, commissions and departments, and the United States of America or any of its departments or agencies. (Added Stats. 1943, c. 370,

p. 1896, as amended Stats. 1951, c. 445, p. 1458, Section 3, operative October 1, 1951.)”

California Water Code Section 10504

“Restrictions on release or assignment. No priority under this part shall be released nor assignment made of any appropriation that will, in the judgment of the Department of Finance, deprive the county in which the appropriated water originates of any such water necessary for the development of the county. (Added Stats. 1943, c. 370, p. 1896.)”

California Water Code Section 10505

“Limitations. The limitations prescribed in Section 11460 and 11463 shall also apply to any agency of the State or Federal Government which shall undertake the construction or operation of the project, or any unit thereof, including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object contemplated by this part. (Added Stats. 1951, c. 1325, p. 3216, Section 1.)”

California Water Code Section 11128

“Prior right to watershed water. In the construction and operation by the authority of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the authority directly or indirectly of the prior right to

all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein. (Added Stats. 1943, c. 370, p. 1896.)”

California Water Code Section 11460

“*Exchange of watershed water.* In the construction and operation by the authority of any project under the provisions of this part, no exchange of the water of any watershed or area for the water of any other watershed or area may be made by the authority unless the water requirements of the watershed or area in which the exchange is made are first and at all times met and satisfied to the extent that the requirements would have been met were the exchange not made, and no right to the use of water shall be gained or lost by reason of any such exchange. (Added Stats. 1943, c. 370, p. 1896.)”

California Water Code Section 11463

“Policy guiding action on applications. In acting upon applications to appropriate water the department shall be guided by the policy that domestic use is the highest use and irrigation is the next highest use of water. (Stats. 1943, c. 368, p. 1616, Section 1254.)”

California Water Code Section 1254

**CONSTITUTION OF THE STATE OF
CALIFORNIA
ARTICLE XIV**

Sec. 3. Conservation of water resources; restriction of riparian rights.

“Sec. 3. It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any ap-

proprietor of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained. (Added Nov. 6, 1928.)”

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 606

CITY OF FRESNO, PETITIONER

v.

STATE OF CALIFORNIA, UNITED STATES OF AMERICA,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND H. P. DUGAN, EDWIN F.
SULLIVAN, AND JAMES M. INGLES IN OPPOSITION

OPINIONS BELOW

The opinion and supplemental opinion of the district court are reported *sub nom. Rank v. Krug (United States)* at 142 F. Supp. 1-198. The opinion of the court of appeals (Pet. App. 1-45) and its opinion denying the City of Fresno's petition for rehearing (Pet. App. 50-52) are reported *sub nom. California v. Rank* at 293 F. 2d 340.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1961 (Pet. App. 46-47). The City of Fresno's petition for rehearing was denied on Au-

gust 14, 1961 (Pet. App. 48-49). On November 3, 1961, Mr. Justice Douglas extended the time for the City of Fresno to file a petition for a writ of certiorari to December 12, 1961. The petition was filed on December 11, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a municipal user's claim of a right to purchase water from a federal reclamation project at the same rates as those charged to irrigation users may be asserted in a suit against subordinate officials of the Bureau of Reclamation.

2. Whether Congress has consented to the prosecution against the United States of the type of suit in which such a claim was made in this case.

3. Whether there is any merit to such a claim, in view of the valid federal policy of subsidizing the sale of project water for irrigation purposes.

STATUTES INVOLVED

Section 208(a) of the Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666, provides:

(a) Joinder of United States as defendant; costs.

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States

is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Service of summons.

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State.

Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

Section 9(c) of the Reclamation Project Act of August 4, 1939, 53 Stat. 1193, as amended, 43 U.S.C. 485h(c), provides in relevant part:

The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract, either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the

use of the contracting party, with interest not exceeding the rate of $3\frac{1}{2}$ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper * * *.

STATEMENT

This is, in the words of the court below (Pet. App. 24), a "special phase" of a case in which another petition for certiorari, filed by the Solicitor General on behalf of certain local officials of the Bureau of Reclamation of the Department of the Interior, is pending in this Court, *Dugan v. Rank*,

No. 366, this Term.¹ This suit (the background and nature of which are more fully described at pp. 3-4 of our petition in No. 366) was instituted by a number of users of water from the San Joaquin River to enjoin the aforesaid Bureau of Reclamation officials (the individual respondents herein) from interfering, by means of the Bureau-administered Central Valley Project, with their water rights, or to obtain a "physical solution" that would provide them with water to meet their needs. Subsequently the United States (over its objection that it was immune from suit) was joined as a necessary party defendant, and the City of Fresno (petitioner herein) intervened as a party plaintiff.

On the main issues litigated in the district court—the merit and justiciability of the claims of riparian and overlying users of San Joaquin River water *vis-à-vis* the Central Valley Project—petitioner here stood in essentially the same position as the other plaintiffs. It participated in the litigation of those issues; it received the benefit of the district court's decision in favor of the plaintiffs and of the court of appeals' affirmance thereof; and when the Bureau of Reclamation officials sought a writ of certiorari in No. 366 to test the decisions of the courts below on the central issues presented by this proceeding, petitioner here was named as a respondent and has joined in the filing of a brief in opposition.

However, in addition to these main issues, petitioner here raised an essentially unrelated question in the

¹ The Court was requested to hold that petition in abeyance until the court below had disposed of petitions for rehearing that are still pending before it.

district court. Under the project plan of the Central Valley Project, "project water" is delivered to irrigation districts and other public entities pursuant to contracts providing for appropriate payment, and petitioner desired to obtain such water for municipal purposes to supplement its existing water supply. Accordingly, in the trial court it claimed (and sought a judicial declaration of) a right to contract to receive such water at a price of \$3.50 per acre-foot, the amount charged for water delivered for irrigation purposes. The Department of the Interior considered \$10 per acre-foot to be the appropriate charge for water delivered for municipal purposes. The difference arose from the fact that, while for irrigation purposes the price charged does not include interest on the investment in facilities (see *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 295), Section 9(c) of the Reclamation Project Act of August 4, 1939, 53 Stat. 1193, as amended, 43 U.S.C. 485h(c) (see pp. 3-4, *supra*), permits the Secretary of the Interior to include interest in determining the amount to be paid under contracts "to furnish water for municipal water supply or miscellaneous purposes * * *."

The district court declared that the City of Fresno had a right to an additional water supply superior to any right of the United States to divert water, through the Central Valley Project, beyond the watershed or county of origin; that Fresno had not as yet constructed any works by which it could receive project water; and that (142 F. Supp. at 185):

If, as, and when the City of Fresno is in a position to take and receive the water, it will then be sufficient time to enforce that right by an

appropriate decree under the provisions of Section 2202 of Title 28 United States Code.

As to the rate claim, without mentioning the statute relied upon by the Secretary of the Interior, the district court held (*ibid.*):

The City of Fresno is entitled to a declaratory judgment that any charge for water which may be made by the United States should be reasonable. Reasonableness, in light of the facts and the Federal Reclamation Act and the Statutes of California, requires that such charges should be no more than the Irrigation Districts are charged from time to time for Class I water.

The court of appeals reversed and directed that the judgment "be vacated and set aside insofar as it relates to the terms upon which the City of Fresno is entitled to receive water from the United States at Friant Dam" (Pet. App. 45). As we have discussed at pp. 5-6 of our petition in No. 366, the court held that this suit could not be maintained against the United States, because it had not consented to such a suit. On the main issues of the case, it held that a suit to enforce the plaintiffs' water rights could be maintained against individual officials of the Bureau of Reclamation on the ground that their conduct of the Central Valley Project constituted a trespass upon those rights that had not been authorized by Congress. However, with respect to the separate claim of petitioner herein to a right to contract for water at a certain rate, the court reasoned (Pet. App. 25-26):

In negotiating and contracting for the delivery of water from Friant Dam, defendant officials were acting within the scope of their statutory authority and were carrying out the duties imposed upon them by their official positions. It is their administrative function to determine the rates at which water shall be delivered. It cannot be said that their statutory authority is limited to the making of such determination as the courts may find to be reasonable. The complaint of Fresno in this regard is a complaint against the United States and this dispute may not be entertained judicially without a waiver of sovereign immunity on the part of the United States.

With respect to the district court's conclusion that Fresno had water rights superior to those of the United States, the court below found it unnecessary to decide that question because, in any event

Fresno has * * * no vested right to command the services of the United States in receiving its waters. The terms upon which the United States is willing to act in this respect remain an administrative decision which it is within the authority of the defendant officials to make.

(Pet. App. 26-27; see also opinion on rehearing, Pet. App. 51-52). The City's timely petition for rehearing was denied on August 14, 1961 (Pet. App. 49, 51-52).²

² As petitioner notes (Pet. 38, n. 25), a contract for project water has recently been executed between the City and the United States. It provides, *inter alia*:

ARGUMENT

The government's petition for a writ of certiorari in *Dugan v. Rank*, No. 366, this Term, presents important questions concerning (1) the relationship between the judicial and executive branches of the federal government, (2) the federal power of eminent domain, and (3) the sovereign immunity of the United States, all of which should be reviewed by this Court. However, the issues presented by the present petition are completely separable from the questions in No. 366. They were correctly decided by the court below and are not of sufficient importance to warrant further review.¹

1. The court below was plainly correct in holding that petitioner's claims could not be asserted in a suit against the United States or against the respondent officials of the Bureau of Reclamation without the government's consent to be sued. In claiming a right to receive water at a price of \$3.50 per acre foot, petitioner

12. (a) Nothing in this contract shall be construed as affecting the rights of the parties to or concerned in that certain action entitled (*State of California, United States of America, et al. v. Rank, et al.* (No. 15840) now on appeal in the Circuit Court of the United States in and for the Ninth Circuit.

(b) In the event any of the provisions of this contract shall be contrary to any issue as finally decreed in said *State of California, United States of America, et al. v. Rank, et al.*, then this agreement shall be amended to comply with the said final decree: *Provided, however*, That in any event the City shall be entitled to the amount of water specified in Article 3 hereof or such amount as may be decreed in *State of California, United States of America, et al. v. Rank, et al.*, whichever amount is the larger.

¹ The reason for holding No. 366 in abeyance, see note 1, *supra*, does not apply to the instant petition, nor does petitioner so contend.

has never contended that the respondent officials were acting beyond their statutory authority in refusing to contract at such a rate; as the court below held (Pet. App. 25-26), there cannot be any serious question as to the discretion they have been granted in that regard. Moreover, it is perfectly plain that to vindicate the right to contract claimed by petitioner would require the respondent officials to take affirmative action in their governmental capacity.⁴ Thus the sole grounds on which the court below distinguished such cases as *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, in holding the respondent officials amenable to suit for alleged interferences with the plaintiffs' water rights, are clearly inapplicable to petitioner's claim of a right to contract. Of course, sovereign immunity cannot be evaded by couching relief sought in terms of a declaration of a right to enter into a contract containing certain provisions, rather than by directing a mandatory injunction to compel the government officer to contract on those terms. *Love v. United States*, 108 F. 2d 43, 50 (C.A. 8); *Anderson v. United States*, 229 F. 2d 675 (C.A. 5); cf. *Blackmar v. Guerre*, 342 U.S. 512, 515-516.⁵

⁴ Similarly, since affirmative action would be required of the Secretary of the Interior, who is the officer empowered by statute to execute such contracts, 48 U.S.C. 485(h)(c) (see pp. 3-4, *supra*), the limitation the court below made of the rule of *Williams v. Fanning*, 332 U.S. 490 (Pet. App. 28)—i.e., "that a superior officer is indispensable only if the relief granted will require him to take affirmative action"—is of no help to petitioner.

⁵ It is petitioner's position, as expressed in its petition for rehearing in the court below (pp. 44-46), that the court could

2. Petitioner also contends that the United States had actually consented to this suit, by virtue of 43 U.S.C. 666 (see pp. 2-3, *supra*). The court below was manifestly correct in concluding upon a careful analysis of the legislative history and of the law of western waters to which the statute related, that in none of its aspects was the suit involved in this case the type of suit for a general adjudication of water rights contemplated by 43 U.S.C. 666 (Pet. App. 12-17). See *Miller v. Jennings*, 243 F. 2d 157 (C.A. 5), certiorari denied, 355 U.S. 827.

3. Moreover, even if petitioner's claim could be asserted against the United States or its individual officials, it is wholly lacking in merit. In enacting the Reclamation Project Act of 1939, Congress clearly contemplated that higher rates for project water could be charged to municipal and industrial users than those charged for irrigation purposes. As this Court noted in *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275, 295, interest is not taken into account in fixing rates for irrigation water, so that the supplying of project water for such purposes involves a "subsidy." See also *Swigart v. Baker*, 229 U.S. 187, 197. However, the Reclamation Project Act expressly authorizes the Secretary of the Interior to include interest when fixing the price at which municipalities might secure project water. Under the circumstances, it is clear that there can be no right to obtain water for municipal purposes at the same rate charged for irrigation

"grant affirmative relief as part of its injunctive process by ordering the defendant Bureau of Reclamation officials to execute the customary contract therefor."

purposes. Nor is such a distinction in any way unreasonable. As this Court observed in the *Ivanhoe* case, *supra*, 357 U.S. at 295, "beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges." In view of the prime purpose of the reclamation legislation to promote irrigation, it was entirely proper for Congress to conclude that a given amount of subsidy should be conferred upon water used for irrigation, while a lesser amount or none at all should be conferred upon water for municipal, industrial or power purposes.*

4. The district court recognized that the City of Fresno had not constructed any works to bring a supplemental supply of San Joaquin water to it and its decree "declared" that when the City should do so, the respondent officials would be enjoined from diverting water until the City's prior rights were satisfied (142 F. Supp. at 185). Petitioner's claim of preferred water rights over anyone who would divert water beyond the watershed or county of origin (see p. 6, *supra*) thus presents a purely academic question at the present time and, as the court of appeals said in denying rehearing, that academic claim is unrelated to petitioner's other claim of a right to contract for project water at the irrigator's price (Pet. App. 52). Since the Declaratory Judgment Act may not be used as a medium for securing an advisory opinion, *Coff-*

*The line of cases cited in the petition (Pet. 29), relating to judicial review of rates in the framework of a comprehensive scheme of economic regulation of privately owned enterprises is, of course, irrelevant.

man v. Breeze Corporations, 323 U.S. 316, 324, the court of appeals was plainly right in saying that this claim of the City involves "speculation upon future events and future issues and decision must await the occurrence and the dispute" (Pet. App. 52).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
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Attorney.

JANUARY 1962.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

No. 606

CITY OF FRESNO,

Petitioner,

VS.

STATE OF CALIFORNIA, UNITED STATES
OF AMERICA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

This brief is submitted in opposition to the petition of the City of Fresno for writ of certiorari. It is submitted on behalf of the State of California, the Delano-Earlimart, Exeter, Ivanhoe, Lindero, Lindsay-Strathmore, Lower Tule River, Madera, Orange Cove, Porterville, Saucelito, Stone Corral, Terra Bella, and Tulare Irrigation Districts, and the Southern San Joaquin Municipal Utility District.

OPINIONS BELOW

The opinion and supplemental opinion of the District Court are reported as *Rank v. Krug*, 142 F. Supp. 1-198. The opinion of the Court of Appeals and its opinion denying the City of Fresno's petition for rehearing are reported as *California v. Rank*, 293 F. 2d 340. The opinion of the Court of Appeals upon the rehearing granted the State of California and the irrigation districts is reported as *California v. Rank*, Ninth Circuit Court of Appeals, February 14, 1962.

JURISDICTION

The judgment of the Court of Appeals was entered March 31, 1961. The City of Fresno's petition for rehearing was denied August 14, 1961. On November 3, 1961, Mr. Justice Douglas extended the time for the City of Fresno to file a petition for Writ of Certiorari to December 12, 1961, and the petition was filed December 11, 1961. On January 8, 1962, Mr. Justice Douglas extended the time of the parties joining in this brief to file a brief upon the petition of the City of Fresno to thirty days after decision upon the rehearing granted these parties in the Court of Appeals. The opinion upon the rehearing was filed February 14, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a suit against subordinate officials of the Bureau of Reclamation, the water of a federal reclamation project may be ordered sold at a price fixed by the courts.

2. Whether the United States has consented to be sued for the purpose of having the courts fix and determine the rates to be charged for water furnished by federal reclamation projects.

3. Whether the reclamation law requires that water for municipal uses be supplied at the same rates as those charged for irrigation water.

STATUTES INVOLVED

Section 208(a) of the Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666, provides:

(a) Joinder of United States as defendant; costs.

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and

(2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Service of summons.

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State.

Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

Section 9(c) of the Reclamation Project Act of August 4, 1939, 53 Stat. 1193, as amended, 48 U.S.C. 485h(c), provides in relevant part:

The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract, either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of $3\frac{1}{2}$ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by

him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper * * *.

STATEMENT

This litigation and the basic issues involved are described in the petition for certiorari filed on behalf of the appellant subordinate officials of the Bureau of Reclamation, Department of the Interior, *Dugan v. Rank*, No. 366, October Term 1961, and in the brief, in response to the petition herein, filed on behalf of the United States and the same subordinate officials of the Bureau of Reclamation.

The principal issues in this case, involving an effort of certain local claimants to water rights to control

the operation of the Central Valley Project, California, and to negate the exercise, by the United States, of its power of eminent domain in furtherance of the Project, are the subject of the petition in *Dugan v. Bank*, above, in which the petitioner herein was named as a respondent and is participating.

The petition in the instant matter serves no purpose except as it is directed to a special phase of the case, related particularly to the petitioner, City of Fresno. This is the decision of the court below that petitioner has no right to command the use of a federal reclamation project at rates determined by the courts, rather than the Secretary of the Interior, who is charged by law with the operation of the project and the determination of charges to be made for its use. (Reference is made to pages 4 to 8 of the brief for the United States herein, for further particulars in this regard.)

The petition of the petitioner herein for a rehearing by the court below was denied August 14, 1961 (Pet. App. 49, 51-52).

ARGUMENT

The questions presented by this petition, apart from those presented by *Dugan v. Rank*, No. 366, October Term 1961, were so clearly decided in the correct manner by the court below that a review by this Court is not warranted.

1. The Central Valley Project, California, from which petitioner claimed the right to demand water, is a federal reclamation project, constructed and owned by the United States and operated by the Department of the Interior under federal reclamation law. There can be no possible question of the right of the United States to construct the project, or of the Secretary of the Interior to operate it and to contract for the delivery of water therefrom.¹

The specific claim of petitioner is that it is entitled to demand, and to have the courts order, that water be delivered to it at a price fixed by the courts. If this claim were correct, any and all other terms upon which the water is to be delivered would logically also be subject to determination by the courts. This is tantamount to saying that the courts will take over the operation and administration of any authorized reclamation project whenever their opinions as to the manner in which it should be operated differ from that of the Department of the Interior. The result would be a complete destruction of the basic separa-

¹ *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275.

tion of powers upon which our system of federal government is based.²

The Secretary of the Interior is the officer empowered by law to execute contracts of this nature, and, specifically, to determine the rates which are to be charged.³ The Secretary of the Interior is not a party to this action. Only certain subordinate local officials of the Bureau of Reclamation were made parties. We are aware of no case where a subordinate administrative official has been ordered to affirmatively contract away property of the United States, or its use, without the joinder of the responsible official charged with the duty and vested with the power to make such a contract and fix its terms, in this instance the Secretary of the Interior. On the contrary there can be no question that, at least upon this special phase of the case, the Secretary was an indispensable party.⁴

2. Petitioner contends that the United States should not have been dismissed from the action, but that it has consented to be sued. This contention is based upon Section 208(a) of the Act of July 10, 1952, quoted above in the section on statutes involved.

The court below correctly decided that the United States had not waived its sovereign immunity in actions of this type. Whatever else may be said of the

²*United States v. United States District Court*, 206 F.2d 303, 310-11 (concurring opinion).

³48 U.S.C. 485h(c).

⁴*Webster v. Fall*, 266 U.S. 507; *Gnerich v. Rutter*, 265 U.S. 388; *Warner Valley Stock Co. v. Smith*, 165 U.S. 28.

above Section 208(a), it does not remotely purport to authorize suit against the United States to compel it to contract for the sale of its property (to contract for delivery of water from a federal reclamation project, necessarily involving the use of works constructed and owned by the United States), much less upon any particular terms. Upon this special phase of the case, the attempted joinder of the United States was so manifestly improper as not to warrant further discussion.

3. Aside from the other aspects of this matter, the petitioner's contention that it is, as a matter of right, entitled to municipal water from a federal reclamation project at the same cost as that charged to irrigation users, is entirely without substance.

This court is fully cognizant of the fact that interest upon the government's investment in a reclamation project is not taken into account in fixing rates charged for irrigation water, as pointed out in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 295. On the other hand, 48 U.S.C. 485h(c) specifically authorizes inclusion of an interest charge in fixing rates for a municipal water supply, and equally specifically designates the Secretary as the proper official to determine whether such charge shall be made and its amount. Petitioner's argument that charges for municipal water must be identical to those charged for irrigation water is not of sufficient substance or merit to warrant review of its rejection by the court below.

4. Petitioner also makes certain contentions regarding the so-called County or Origin and Watershed Protection Statutes. They present no issue here because state law does not control the operation of a federal project or fix the contract terms upon which the United States may deliver water.⁵ Until the problem becomes something more than an academic possibility that petitioner might attempt to obtain water by its own system of works, declaratory relief is not available.⁶

5. These appellant irrigation districts requested and were granted a rehearing below. The special phase of the case relating to petitioner's claimed right to contract for water was not involved or considered upon the rehearing. The rehearing is therefore of no importance upon this phase of the case.

⁵*Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 292.

⁶*Coffman v. Breeze Corporation*, 323 U.S. 316, 324.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari by the City of Fresno should be denied.

Dated: March 14, 1962.

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Appellants' Exhibits Included in This Brief:

Exhibit I. Map of the State of California showing location of the Central Valley.....	opposite p. 16
Exhibit II. Map of physical features of the San Joaquin River Watershed	follows p. 16
Exhibit III. Photograph of Mr. Cobb in dry river bed.....	33
Exhibit IV. Photograph of Mr. Cobb in wet river bed.....	35
Exhibit V. Water Table Hydrograph.....	opposite p. 84
Exhibit VI. Map of the State of California showing Fresno Is in the Service Area of the Central Valley Project.....	follows p. 85

IN THE
Supreme Court of the United States

OCTOBER TERM, 1962.

No. 51.

CITY OF FRESNO,

Appellant,

vs.

STATE OF CALIFORNIA, UNITED STATES OF AMERICA,
et al.,

Respondents.

Appeal From Opinion of the United States Court of
Appeals for the Ninth Circuit.

BRIEF OF PETITIONER.

The City of Fresno appeals from the Opinion in the above entitled case from the United States Court of Appeals for the Ninth Circuit entered March 31, 1961, as amended by supplemental Opinion entered by said Court on the 14th day of August, 1961, and as amended by decision on rehearing by the Opinion of said Court on the 14th day of February, 1962.

The Opinion of the Court below of March 31, 1961, was not printed in any official publication but was combined with the amendment to said Opinion dated August 14, 1961, and both appear as one Opinion in *State of California, United States of America v. Rank*, 293 F. 2d 340 (1961) in the official reports. As stated, this Opinion set forth in the official reports was again slightly amended by an Opinion of the Court below on rehearing dated the 14th day of February, 1962, which is not printed, but is set forth on page 1 of the Appendix to this brief. The difference

in the actual dates and Opinions as compared to the published Decision is pointed out just so that this Court may see that the various steps on certiorari and appeal were filed in proper time.

I.

OPINIONS IN THE COURTS BELOW.

A. Opinions in the District Court.

The Opinion of the District Court on the trial on the merits in this case is reported as *Rank v. (Krug) United States*, in 142 F. Supp. 1 (1956).

The same District Court rendered an earlier companion Opinion, *Rank v. Krug*, 90 F. Supp. 773 (1950), on respondents' motion to strike the complaint in this case covering many of the identical issues of this case on the trial on the merits in the District Court (*Rank v. (Krug) United States*, 142 F. Supp. 1 (1956)), which Decision in 90 F. Supp. 773 (1950) is cited with approval by this Court in *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 754, 70 S. Ct. 955, 970, 94 L. Ed. 1231 (1950).¹

To other Opinions in the District Court also involve this same case. These decisions are *Rank v. United States*, 16 F. R. D. 310 (1954), which is not particularly material to this appeal and *City of Fresno v. Edmonston*, 131 F. Supp. 421 (1955), in which case the District Court as an ancillary proceeding enjoined the California State Engineer, whose duties are now performed by the California Water Rights Board, from

¹"22. United States District Court, Southern District of California rendered a decision on April 12, 1950, in *Rank v. Krug*, 90 F. Supp. 773, consistent with the views we take of the issues here involved."

United States v. Gerlach Live Stock Co., 339 U. S. 725, 754, 70 S. Ct. 955, 970, 94 L. Ed. 1231 (1950).

interfering with the jurisdiction of the District Court on the trial on the merits in this case by attempting to pass on the applications of the City of Fresno and the United States to appropriate waters of the San Joaquin River before the District Court in this case could make a decision on whether a hearing on these applications to appropriate, before the State Engineer was necessary in view of the long delay of the State Engineer to act on said applications to appropriate and before the District Court in this case could make a declaratory judgment on the question of whether the City of Fresno's domestic and municipal applications to appropriate water had priority over the applications of the United States to appropriate water under the California domestic and municipal priority and the California County of Watershed and County of Origin priority laws. Respondents appealed this decision of the District Court to the Ninth Circuit Court of Appeals, *Holsinger v. City of Fresno*, but on motion of Appellant City of Fresno this appeal was dismissed by the Court below on June 18, 1957. (*Holsinger v. City of Fresno*, 246 F. 2d 263 (1957)).

The District Court in this case, *Rank v. (Krug) United States*, 142 F. Supp. 1 (1956), gave a declaratory judgment that the applications for water of the City of Fresno for domestic and municipal use had priority over any rights of the United States,² but held that nevertheless the administrative agency, the State Engineer (now the California Water Rights Board), had to first hear and rule on the applications before a court could review them,³ and then ordered the injunc-

²*Rank v. (Krug) United States*, 142 F. Supp. 1, 184 (1956).

³*Rank v. (Krug) United States*, 142 F. Supp. 1, 182-184 (1956).

tion granted in *City of Fresno v. Edmonston*, 131 F. Supp. 421 (1955) dissolved, so that the State Engineer (now the California Water Rights Board) could pass on said applications to appropriate.⁴ This Court has also ruled that the Bureau must file applications to appropriate water in the western states under the Basic Reclamation Law of 1902 as amended.⁵

**B. Decision of the California Water Rights Board
No. D-935, June 2, 1959.**

After the Decision of the District Court in this case (142 F. Supp. 1 (1956)), the State Water Rights Board being relieved from the injunction in *City of Fresno v. Edmonston*, *supra*, rendered its decision on the applications of the City of Fresno and the United States to appropriate waters of the San Joaquin River (Decision No. D-935, June 2, 1959), after a hearing lasting eighteen months in which the appellant City of Fresno, the United States of America and all respondent irrigation districts, including both respondent Madera Irrigation District and Respondent South San Joaquin Municipal Utility District, voluntarily appeared and participated. Under California law this Decision was subject to a judicial review by the courts. The City of Fresno filed a petition to review but the United States did not. The appellant City of Fresno then dismissed its petition to review with prejudice. This decision of the California Water Rights Board has now become final as to all parties in this case including the appellant City of Fresno, the respondent irrigation districts and the United States of America.⁶

⁴*Rank v. (Krug) United States*, 142 F. Supp. 1, 183 (1956).

⁵*United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 70 S. Ct. 955, 972, 94 L. Ed. 1231 (1950).

⁶This Decision granted the disputed application to appropriate

C. Opinions in the Court Below.

The opinion of the Court of Appeals dated and entered March 31, 1961, as amended and explained by Opinion of said Ninth Circuit Court of Appeals on rehearing dated and entered the 14th day of August, 1961, as heretofore stated appears as a combined opinion in *State of California, United States of America v. Rank*, 293 F. 2d 340, 360 (1961) and was further supplemented by Opinion on Rehearing dated February 14, 1962, *State of California, United States of America v. Rank*, which as stated does not appear as yet to have been printed in the official reporter.

Two other earlier opinions of the Court below in addition to *Holsinger v. City of Fresno*, 246 F. 2d 263 (1957), also involve this case. They are *United States v. United States District Court*, 206 F. 2d 303 (9th Cir.) (1953) and *State of California v. United States District Court*, 213 F. 2d 818 (9th Cir.) (1954), in which the United States unsuccessfully tried to prevent the District Court from rendering judgment in this case by petitions for writ of mandate and prohibition directed to the District Court, which petitions were denied by the Court below.

water of the San Joaquin River to the United States and denied the City of Fresno's application to appropriate, but provided that the United States "shall provide water to the City of Fresno out of the Central Valley Project of not less than 50,000 acre-feet after execution of water service contracts with the United States, all in accordance with Federal Reclamation laws; and subject to such provisions as may be imposed by Final judgment on *Rank v. Krug*" (the case presently before this Court) and further providing in substance that the City of Fresno under such contract was to receive only Class I irrigation water without any domestic or municipal priority in years of shortage, as the respondent officials had done in contracts with other California cities.

II. JURISDICTION.

The Court below first rendered an Opinion in this case on March 31, 1961. The City of Fresno, petitioner herein, filed a petition for rehearing on the 1st day of June, 1961, in the Court of Appeals, which was denied by the Court of Appeals on August 14, 1961. By order of Mr. Justice Douglas dated November 3, 1961, the time for the City of Fresno, petitioner herein, to file a Petition for Writ of Certiorari was extended to and including December 12, 1961. The petition for certiorari was filed December 11, 1961, and was granted April 2, 1962.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

The basis for jurisdiction of the District Court was 28 U. S. C. 1331.

III.

THE CONSTITUTIONAL PROVISIONS, STATUTES AND DOCUMENTS WHICH THE CASE IN- VOLVES.

A. Constitution of the United States.

1. First and Fifth Amendments to the Constitution of the United States (see Appendix page 3)

B. Acts of Congress.

1. Act of March 3, 1877, 19 Stat. 377 (see Appendix page 5)
2. Act of June 17, 1902, 32 Stat. 388 at 389-390, Sec. 4 and 8 (43 U. S. C. 391) (see Appendix page 6)
3. Act of April 16, 1906, 34 Stat. 116 and 117 (see Appendix page 7)

4. Act of February 25, 1920, 41 Stat. 451 and 452 (see Appendix page 8)
5. Act of June 10, 1920, 41 Stat. 1063 at 1077 (see Appendix page 8)
6. Act of December 5, 1924, 43 Stat. 672 at 702 (see Appendix page 9)
7. Act of December 21, 1928, 45 Stat. 1057 at 1059-1060 (see Appendix page 11)
8. Emergency Relief Appropriation Act of 1935, 49 Stat. 115 (see Appendix page 11)
9. Act of August 30, 1935, 49 Stat. 1028 and 1038 (see Appendix page 12)
10. Act of June 22, 1936, 49 Stat. 1597 at 1622 (see Appendix page 12)
11. Act of August 26, 1937, 50 Stat. 844 at 850 (see Appendix page 14)
12. Act of August 4, 1939, 53 Stat. 1187 at 1194 (see Appendix page 14)
13. Act of October 17, 1940, 54 Stat. 1198 and 1200 (see Appendix page 15)
14. Act of December 22, 1944, 58 Stat. 887 at 889-890 (see Appendix page 16)
15. Act of October 14, 1949, 63 Stat. 852 and 853 (see Appendix page 16)
16. Act of September 26, 1950, 64 Stat. 1036 (see Appendix page 17)
17. Act of July 10, 1952, 66 Stat. 516 at 560 (see Appendix page 18)
18. Act of July 2, 1956, 70 Stat. 483 at 484 (see Appendix page 19)
19. Federal Rules of Civil Procedure (28 U. S. C.) Rule 75(d) (see Appendix page 19)

20. **Federal Rules of Civil Procedure (28 U. S. C.)**
Rule 75(i). (see Appendix page 19)
21. 28 U. S. C. 1254 (1)
22. 28 U. S. C. 1442 (a) (3)

C. Federal Documents.

1. Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935. (Issued in accordance with the Act of December 5, 1924, 43 Stat. 672 at 702, Section 4, Subsection B) (see Appendix page 20)
2. Document 35, 73rd Congress (see Appendix page 30)

D. State of California Constitution and Statutes.

1. California Constitution, Article XIV, Sec. 3 (see Appendix page 31)
2. California Water Code Sections: 104, 106, 1254, 1460, 10500, 10504, 10505, 11126, 11127, 11128, 11207, 11225, 11226, 11460 and 11463 (see Appendix page 32)
3. Statutes of California, 1933, 50th Session, Chapter 1043, 2643 to 2645. (Approved by the Governor August 5, 1933; initiative vote of People of the State of California of December 19, 1933; officially declared by the Secretary of State on January 8, 1934; effective January 8, 1934) (see Appendix page 37)
4. Code of Civil Procedure of California, Sections 382 and 1094.5.
5. Title 23, Article 11, Section 712, State of California Administrative Code.

IV.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the determination of the limits of the statutory authority of administrative officials of the United States under the Constitution and Acts of Congress is a judicial or administrative determination.

2. Whether the determination of whether respondent administrative officials of the United States Bureau of Reclamation in this case are acting in excess of and in violation of the authority granted them by the Constitution, the Basic Reclamation Act of June 17, 1902, as amended, and the other Acts of Congress providing for the construction and operation of the Central Valley Project in California and other Acts of Congress is a judicial or an administrative determination as ruled by the Court below.

3. Whether the respondent Bureau of Reclamation officials in the construction and operation of the Central Valley Project and other respondents are acting illegally, arbitrarily, unreasonably, capriciously and in excess of and in violation of the authority granted and conferred upon them by the Constitution, the Basic Reclamation Act of June 17, 1902, 32 Stat. 388 (43 U. S. C. 391), as amended, and the Acts of Congress providing for the construction and operation of the Central Valley Project of California which require respondent Bureau of Reclamation officials to proceed in conformity with State laws relating to the ownership, control, use, appropriation or distribution of water in the construction and operation of the Central Valley Project of California.

4. Whether respondent Bureau of Reclamation officials are required by the Basic Reclamation Act of

June 17, 1902, 32 Stat. 388 (43 U. S. C. 391), as amended, and other Acts of Congress relating to the construction and operation of the Central Valley Project of California are bound by and required to obey and carry out municipal and domestic water priority laws of the State of California in the construction and operation of the Central Valley Project; and whether respondents are acting illegally and in excess of and in violation of the authority conferred upon them by the Constitution and said Acts of Congress in failing and refusing to carry out such laws.

5. Whether the respondent Bureau of Reclamation officials are required by the Basic Reclamation Act of June 17, 1902, as amended, and the other Acts of Congress relating to the construction and operation of the Central Valley Project of California and particularly by the Act of October 14, 1949, 63 Stat. 852 and 853, to reserve for those California counties of origin of river waters and watersheds where river waters originate sufficient water to satisfy the needs of said counties and watersheds in which water originates before exporting said water out of the county and watershed of origin and particularly whether respondent Bureau of Reclamation officials are required by said laws to reserve sufficient water for the original plaintiffs owning riparian lands along the San Joaquin River between Friant Dam and Gravelly Ford Canal and for appellant City of Fresno for its domestic and municipal water uses, which city lies in both the county of origin and watershed of the San Joaquin River.

6. Whether even Congress itself can authorize the taking by respondent officials by eminent domain or condemnation proceedings of appellant City of Fresno's domestic and municipal underground percolating water

supply percolating from the San Joaquin River and which is admittedly pumped, used and is vitally needed for domestic and municipal uses by its citizens for maintenance of their lives and health for secondary agricultural uses by respondent irrigation districts where the City has no other available domestic and municipal supply of water.

7. Whether the determination of the question of whether respondent Bureau of Reclamation officials are illegally and unlawfully adding charges in their water rates out of the Central Valley Project in excess of the charges authorized by Congress is an administrative determination or a judicial determination as ruled by the Court below.

8. Whether, where Congress has limited the charge which may be made by respondent Bureau of Reclamation officials for municipal and domestic water out of the Central Valley Project to repayment of (1) cost of construction of the project allocated to municipal use; (2) to cost of operation and maintenance of such portion of the project during the period of repayment of the same, and (3) to interest. Respondent Bureau of Reclamation officials are acting illegally and in excess of the authority conferred upon them by Congress by unreasonably, arbitrarily, capriciously and in excess of their administrative discretion adding a profit to said authorized charges for municipal and domestic water and other water authorized by Congress supplied from said Central Valley Project, and whether said respondents are using said profit for illegal purposes.

9. Whether one or more of the named plaintiffs in this action may prosecute the class action which is a part of this case.

10. Whether the determination of the question of whether any charge by respondent Bureau of Reclamation officials in excess of \$3.50 per acre-foot for water out of the Central Valley Project to appellant City of Fresno (The Class I irrigation water charge) was unreasonable, illegal, arbitrary, capricious or an abuse of respondents' administrative discretion and in excess of the authority conferred upon them by Congress was a judicial determination as found by the District Court or an administrative determination as held by the Court below, and whether the determination of such a question is a suit against the United States.

11. Whether respondent Bureau of Reclamation officials were authorized by Congress to take the riparian and overlying percolating water rights of the landowners between Friant Dam and Gravelly Ford Canal, including those percolating water rights of appellant City of Fresno, by either eminent domain or condemnation and whether the determination of this question is a judicial determination or an administrative determination.

12. Whether respondents can raise questions for the first time in their appeal briefs or in petitions for rehearing that were not designated in their designation of points on appeal as required by Rule 75(d) Federal Rules of Civil Procedure (28 U. S. C. 75(d)) and particularly whether respondent Bureau of Reclamation officials can raise for the first time the question of whether the District Court's decision that any charge of the respondent Bureau of Reclamation officials in excess of \$3.50 per acre-foot for water from the Central Valley Project (the charge for Class I irrigation water) to appellant, the City of Fresno, was unreason-

able, unlawful and in excess of the authority conferred upon respondents by Congress was not sustained by the evidence where no such point was set forth in respondents' designation of points on appeal in the Court below nor by respondents in their petitions for certiorari, and where the Court below did not find that the District Court's determination that the charge to appellant, the City of Fresno, in excess of \$3.50 per acre-foot for water was unreasonable was not sustained by the evidence.

13. Whether the United States waived its immunity to suit in this case and whether the Court below properly dismissed the United States as a party defendant, after it had been joined as a defendant in this suit by the District Court.

14. Whether the respondent irrigation districts were proper parties herein and as such may be relieved from the injunction of the lower Court where with two exceptions they had voluntarily intervened in the case and where *all* respondent districts asked for affirmative relief throughout the trial in the District Court, to wit, a physical solution, can for the first time on a motion for rehearing after Decision by the Court below, and without designating such right to a dismissal or relief from the injunction of the lower Court in its designation of points on appeal under Rule 75(d), Federal Rules of Civil Procedure (28 U. S. C. 75(d)), or in their appeal brief ask that they be dismissed from this action and relieved from said injunction of said District Court.

V.

STATEMENT OF THE CASE.

City of Fresno v. State of California, et al. (No. 51, October Term, 1962), is a water rights case.

This case is *NOT* an attempt by the City of Fresno and the farmers and other original plaintiffs along the 38-mile stretch of the San Joaquin River below Friant Dam to interfere with the operation of the Central Valley Project as authorized by Congress.

TO THE CONTRARY, THE EFFORTS OF THE CITY OF FRESNO AND THE FARMERS IN THIS CASE ARE DIRECTED TO SPECIFICALLY SEEING THAT THESE GREAT PLANS KNOWN AS THE CENTRAL VALLEY PROJECT OF CALIFORNIA, AS AUTHORIZED BY CONGRESS, ARE CARRIED OUT.

A. Geographic and Physical Features of the Central Valley Project.

The overall plan of the Central Valley Project in California has been described in the decision of this Court in *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950); and *Ivanhoe Irrigation District v. McCracken*, 357 U. S. 275, 78 S. Ct. 1174, 2 L. Ed. 2d 1313 (1958). It is also described by the Court below in *State of California, United States of America v. Rank*, 293 F. 2d 340 (1961) and by the District Court in *Rank v. (Krug) United States*, 142 F. Supp. 1 (1956) (which case is now entitled *City of Fresno v. California, et al.* (No. 51, October Term, 1962) before this Court), and in *Rank v. Krug*, 90 F. Supp. 773 (1950), which decision of the District Court on motion to dismiss in this case was cited with approval by this Court in *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

As this Court stated in *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 728, 70 S. Ct. 955, 957, 94 L. Ed. 1231 (1950).

“Central Valley is a vast basin, stretching over 400 miles on its polar axis and a hundred in width, in the heart of California. Bounded by the Sierra Nevada on the east and by coastal ranges on the west, it consists actually of two separate river valleys which merge in a single pass to the sea at the Golden Gate.”

The northern half of the Central Valley of California is known as the Sacramento Valley and the southern half is known as the San Joaquin Valley.

“The northern half of this valley is known as the Sacramento Valley and is the valley of the Sacramento River * * *.

“The southern half of the Central Valley is known as the San Joaquin Valley and is the valley of the San Joaquin River.”

State of California, United States of America v. Rank, 293 F. 2d 340, 342 (1961).

As stated by this Court in *Ivanhoe Irrigation District v. McCracken*, 357 U. S. 275, 280, 78 S. Ct. 1174, 1178, 2 L. Ed. 2d 1313 (1958), the Sacramento and San Joaquin Rivers which drain the two valleys comprising the Central Valley of California, join in their deltas and flow out to sea through San Francisco Bay.

“The Sacramento River, with headwaters near Mount Shasta, flows south into San Francisco Bay, draining the northern portion of the basin. The San Joaquin River, which rises above Friant

in the south, runs first west then north to join the Sacramento River in the Sacramento-San Joaquin Delta, both finding a common outlet to the ocean through San Francisco Bay."

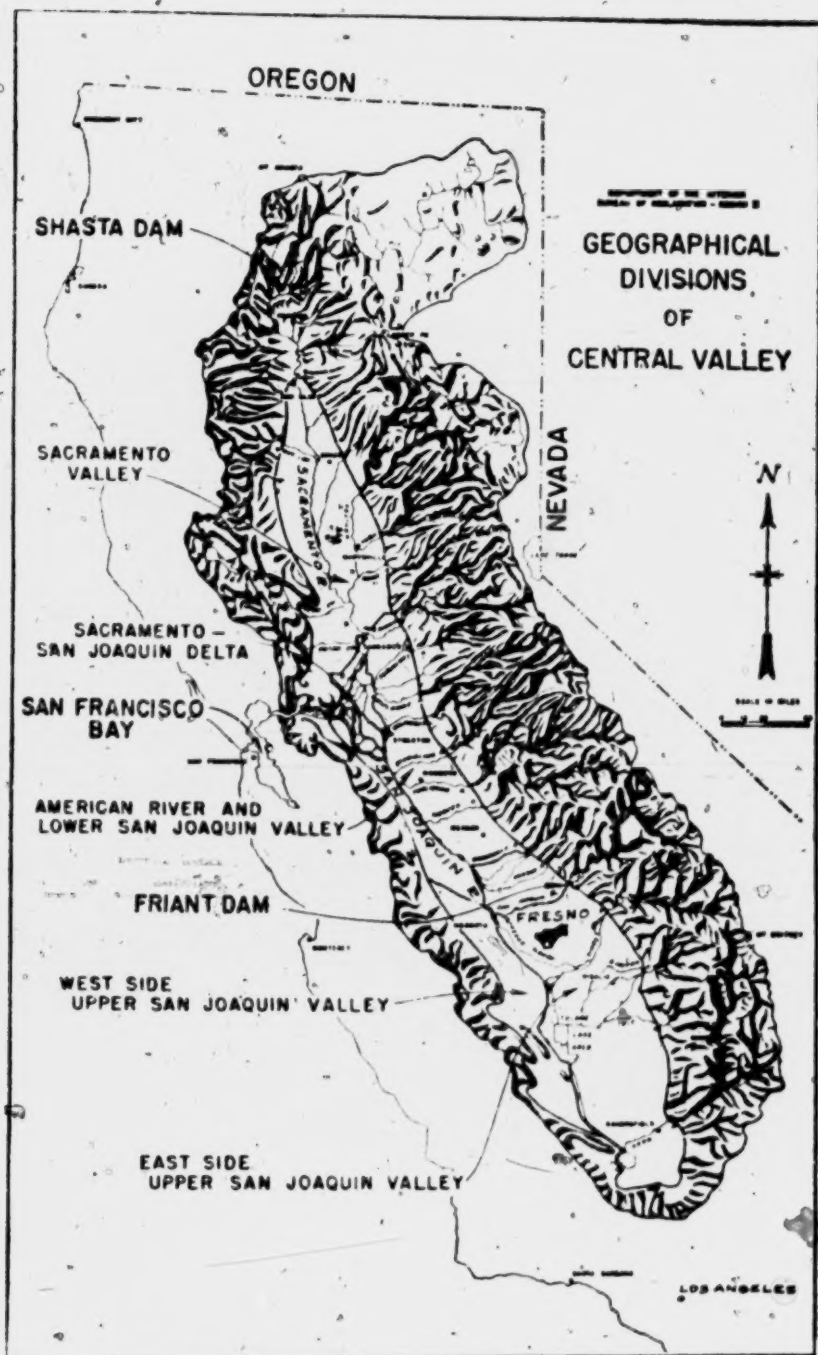
On the opposite page is a map (Exhibit I of this brief) showing the location of the Central Valley and its division into the Sacramento and San Joaquin Valleys, the location of the San Joaquin and Sacramento Rivers *and the location of appellant City of Fresno* in the San Joaquin Valley.⁷

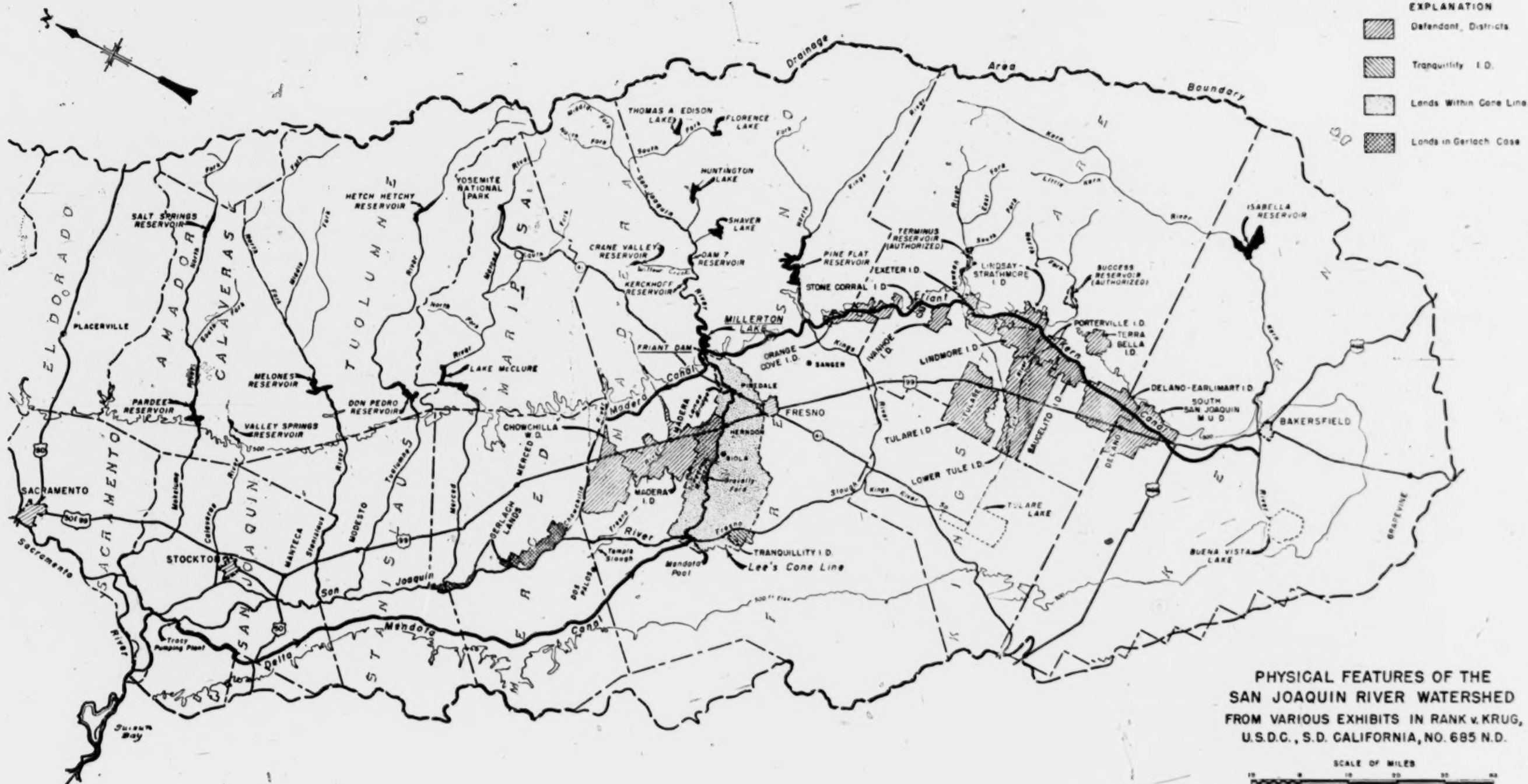
The location of all of the principal features of the Central Valley Project with the exception of Shasta Dam (which, however, is shown on Exhibit I hereof) are shown on Exhibit II of this brief, which Exhibit II is set forth for the convenience of this Court, immediately following this page. This map (Exhibit II hereof) was prepared by the United States Bureau of Reclamation at the request of the District Judge in this case. This map is also to be found in *Rank v. (Krug) United States*, 142 F. Supp. 1, 40-41. This map shows all of the Central Valley Project south of San Francisco Bay (the southern part of San Francisco Bay being designated on said map (Exhibit II hereof) as "Suisun Bay").

Briefly, the Central Valley Project contemplated taking the waters of the San Joaquin River, which formerly were diverted at "Mendota Pool", (shown on Ex-

⁷This map was prepared by the United States Bureau of Reclamation and appears as Plate I of Plaintiffs' Exhibit 143 of this case. For the convenience of this Court, however, there has been added to this map by the engineering department of the Fresno City Municipal Water Department arrows and letters designating the location of San Francisco Bay, Shasta Dam and Friant Dam and some lettering has been enlarged. It is for illustrative purposes only.

EXHIBIT I.





hibit II hereof) diverting them at Friant Dam (shown on both Exhibit I and Exhibit II hereof) into the Madera Canal and Friant-Kern Canals for use in the *six* counties of the San Joaquin Valley, including *Fresno County*, for both irrigation and *municipal* purposes.

"Prior to December 2, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of large area of privately owned land non-riparian to the river, situated both to the north and south of Friant in the counties of Madera, Merced, *Fresno*, Tulare, Kings and Kern in the State of California." (emphasis ours)

Gerlach Live Stock Co. v. United States, 111 Ct. Cls. 1, 27, Aff. 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

"The Central Valley basin development * * * includes * * * water * * * for *municipal* and miscellaneous purposes *including cities* * * *." (emphasis ours)

United States v. Gerlach Live Stock Co., 339 U. S. 725, 733, 70 S. Ct. 955, 959, 94 L. Ed. 1231 (1950).

"The object of the plan is to arrest this flow and regulate its seasonal and year to year variations thereby creating salinity control to avoid the gradual encroachment of ocean water, providing an adequate supply * * * for *municipal* and irrigation purposes * * *." (emphasis ours)

Ivanhoe Irrigation District v. McCracken, 357 U. S. 275, 281, 78 S. Ct. 1174, 1179, 2 L. Ed. 2d 1313 (1958).

The water which was formerly diverted at Mendota Pool (shown on Exhibit II hereof) was to be replaced with Sacramento River water pumped up the Delta-Mendota Canal from the junction of the Sacramento and the San Joaquin Rivers.⁸

The above purposes of the Central Valley Project will be discussed in detail under the subchapter entitled "Legislative History of the Central Valley Project" *infra*.

The major physical features of the Central Valley Project and their estimated costs are set forth in the Feasibility Report signed by President Roosevelt on December 2, 1935, which Feasibility Report this Court has found to be the basis of the Central Valley Project as authorized by Congress.⁹ This Feasibility Report

"* * * the plan as originally adopted and as carried out by the Bureau included *replacement* at great expense of all water formerly used for *crops* and 'controlled grasslands' * * *." (emphasis ours)

United States v. Gerlach Live Stock Co., 339 U. S. 725, 740, 70 S. Ct. 955, 963, 94 L. Ed. 1231 (1950).

"Delta-Mendota Canal will carry surplus Sacramento River water 120 miles southerly from the Delta to Mendota Pool on San Joaquin River. Here the water will be used to meet the demands of *crop* lands now irrigated by diversions from *San Joaquin River*." (emphasis ours)

R. 326 (New Volume) Pltf. Ex. 143, "Comprehensive Plan for Water Resources Development, Central Valley Basin, California," United States Department of the Interior, Harold L. Ickes, Secretary, Project Planning Report No. 2-4.0-3, November, 1945, page 7, Rep. Tr. 6572.

⁹"But it also is true, as pointed out by the claimants, that in these Acts Congress expressly 'reauthorized' a project already initiated by President Roosevelt who, on September 10, 1935, made allotment of funds for construction of Friant Dam and canals under the Federal Emergency Relief Appropriation Act, 49 Stat. 115, 118, Section 4, and provided that they 'shall be reimbursable in accordance with the reclamation laws.' A finding of feasibility, as required by law, was made by the Secretary of the Interior on November 26, 1935, making no reference to navi-

of December 2, 1935, is set forth in full in Appendix "D" to this brief.

The major items of the Central Valley Project and their estimated cost as set forth in the Feasibility Report of December 2, 1935, are as follows:¹⁰

"ESTIMATED COST OF PROJECT

"Kennett Dam (now named Shasta Dam)," ¹¹	
reservoir and power plants	\$ 84,000,000
Kennett transmission line and substation	14,000,000
Contra Costa Conduit	2,500,000
San Joaquin Pumping System (now Delta-Mendota Canal and Tracy Pumping System) ¹²	19,000,000
Friant Dam and reservoir	14,000,000
Eriant-Kern Canal	26,000,000
Madera Canal	3,000,000
Rights of way, water rights and general expenses	8,000,000
(Emphasis ours) Total	\$170,000,000"
Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt December 2, 1935, Appendix "D" hereof.	

gation, and his recommendation of 'the Central Valley development as a Federal reclamation project' was approved by the President on December 2, 1935."

United States v. Gerlach Live Stock Co., 339 U. S. 725, 731-732, 70 S. Ct. 955, 958-959, 94 L. Ed. 1231 (1950).

¹⁰Since the construction and commencement of operation of the original features of the Central Valley Project as set forth in the Feasibility Report of December 2, 1935, Congress has added other features to the Central Valley Project such as the Folsom Dam on the American River and the Trinity River Project.

¹¹Shasta Dam is referred to in the Feasibility Report as Kennett Dam and appears on Exhibit I of this brief. Kennett was a small town formerly located at the base of Shasta Dam where a water gauge on the Sacramento River was maintained and which town of Kennett had to be removed in order to build Shasta Dam; the name Shasta being later given to the dam.

¹²"Delta Mendota Canal will carry surplus Sacramento River water 120 miles southerly from the Delta to Mendota Pool on San Joaquin River. Here the water will be used to meet the demands of crop lands now irrigated by diversions from San Joaquin River." (emphasis ours)

R. 326 (new Volume) Pltf. Ex. 143, "Comprehensive Plan for Water Resources Development, Central Valley Basin, California," United States Department of the Interior, Harold L. Ickes, Secretary, Project Planning Report No. 2-4.0-3, November, 1945, page 7, Rep. Tr. 6572.

Other physical features involved in the Central Valley Project not mentioned in the Feasibility Report, but which are material to this case, are, for the convenience of this Court, set forth:

1. **Sacramento River.**

The Sacramento River which drains the Sacramento Valley is shown on Exhibit I hereof. Only a portion of this river is shown on Exhibit II hereof. It has an average annual flow measured at Sacramento of 17,100,000 acre-feet per year.¹³

2. **San Joaquin River.**

The San Joaquin River is shown on both Exhibit I and Exhibit II hereof. It has an average flow of only 1,751,500 acre-feet measured at Friant Dam.¹⁴ It has an average flow per second-feet of 2,456 cubic feet per second¹⁵ and a maximum flow of 40,069 cubic-feet per second.¹⁶ It arises in Fresno and Madera Counties.¹⁷ It debauches from the Sierra Nevada Mountains at Friant Dam in Fresno County (shown on both Exhibits I and II hereof). Forty-seven miles westward from where it debauches from the Sierra Nevada Mountains at Friant Dam, it reaches Mendota Dam (indicated on Exhibit II as "Mendota Pool") and then turns and flows northwest to its junction with the

¹³U.S.G.S. Water Supply Paper #1715, page 587.

¹⁴R. 2281, 2933, Pltf. Ex. 106-A; Deft. Ex. A-14-A, Rep. Tr. 13,994.

¹⁵R. 2339, Deft. Ex. A-9-A, 13,353.

¹⁶Deft. Ex. A-7-A-3, Rep. Tr. 13,293; Deft. Ex. A-7-A-4, Rep. Tr. 13,317.

¹⁷* * *. The San Joaquin River is a natural water course arising in the Sierra-Nevada in *Fresno* and *Madera* Counties." (emphasis ours)

Meridian, Ltd. v. San Francisco, 13 C. 2d 424, 429, 90 P. 2d 537, 91 P. 2d 105 (1939).

Sacramento River at San Francisco Bay, shown on Exhibit II hereof as "Suisun Bay", a branch of San Francisco Bay.

3. Merced River.

The Merced River is one of the main branches of the San Joaquin River. It joins the San Joaquin River 144 miles downstream from Friant Dam¹⁸ which junction marks the downstream end of that portion of the waters of the San Joaquin River to be taken under the Central Valley Project.¹⁹

4. Gravelly Ford Canal.

This canal takes off from the San Joaquin River at a point 38 miles downstream from Friant Dam. The location of Gravelly Ford Canal is also shown in greater detail in defendants' Exhibit A-9-A-1, R. 2340, 13,361. This point, as will be shown under our discussion of the legislative history of the Central Valley Project, *infra*, marks the downstream end of the waters of the San Joaquin River to be supplied by Friant Dam.²⁰

¹⁸1944 Report Chief of Army Engineers, page 29.

¹⁹"DEFINITION OF RIGHTS TO THE WATERS OF THE SAN JOAQUIN RIVER PROPOSED FOR DIVERSION TO UPPER SAN JOAQUIN VALLEY.

"INTRODUCTION.

"This report presents a definition of the rights to San Joaquin River water which it is assumed appertain to lands receiving water from the river between the Gravelly Ford Canal and Merced River. Under the Central Valley Project, it is proposed to acquire (by purchase, exchange, and appropriation) the right to utilize the waters of the San Joaquin River inhering in these rights, * * *"

Pltf. Ex. 410, Report No. 3, "Definition of Rights to the Waters of the San Joaquin River Proposed for Diversion to Upper San Joaquin Valley," August, 1936, Water Project Authority, State of California, Page 1, Rep. Tr. 23,206.

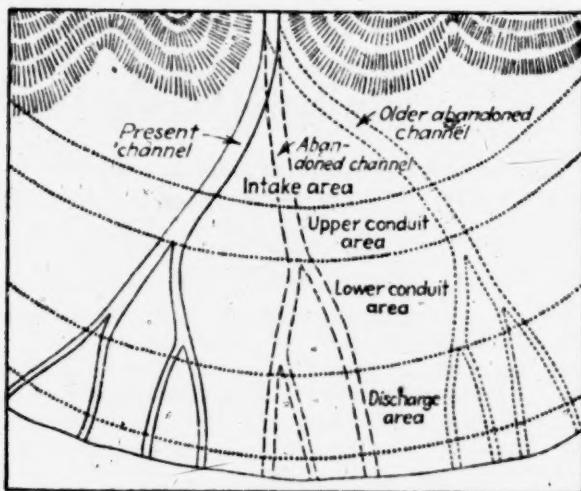
²⁰"9.(a) Defendant's plan, as modified contemplated among other things, that the United States should eventually store and divert to nonriparian use the waters of the San Joaquin River

5. The San Joaquin Alluvial Cone.

The San Joaquin alluvial cone is shown in Exhibit II hereof by the symbols "Lee's Line" and covers an area between Friant Dam and Mendota Pool. In California a percolating water right is the same or analogous to a riparian right. (*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 C. 2d 489, 45 P. 2d 972 (1935).)

(a) Description of an Alluvial Cone.

A diagram from Professor Tolman of the Stanford University Geology Department [R. 2267] shows the typical abandoned channels of a river known as "Pipes" or "aquifers" which carry the percolating water from the river throughout the alluvial cone. We here reproduce such diagram [R. 2267] for the convenience of the Court.²¹

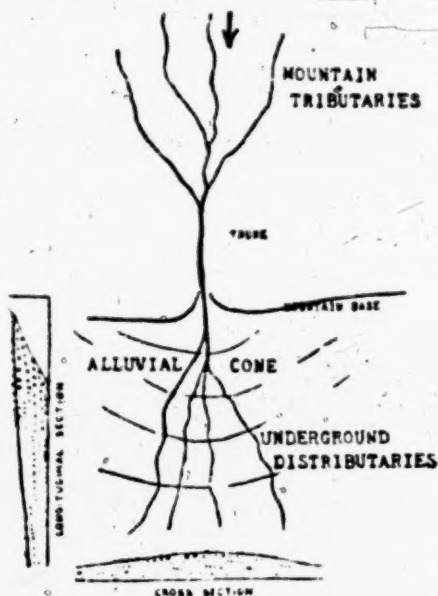


originating above Friant Dam and formerly flowing at or below Gravelly Ford, except for releases from Friant which would be for one or more of three purposes: (1) to satisfy riparian rights between Friant and Gravelly Ford; * * *

Wolfsen v. United States, 162 F. Supp. 403, 411 (1958).

²¹"Alluvial cones are the chief bearers of available ground

Weil's conception of these ancient abandoned stream channels or "pipes" which carry water throughout the alluvial cone are here given.²²



That the San Joaquin percolated over 211,000 acre-feet of water into its alluvial cone annually before the construction of Friant Dam is even admitted by the respondent Bureau of Reclamation engineers.²³

water. These are by far the most important source of water in the arid and semi-arid Southwest."

R. 2269, Pltf. Ex. 68,—Tolman on Groundwater, 522.

²²50 Harvard Law Review 252 (1937).

²³"The Court: Do you have an opinion as to the amount of water that seeps between Friant and Mendota?

The Witness (making calculation): 292 second-feet.

The Court: In other words, and additional 92 second-feet?

The Witness: That is correct.

Now, that question was asked you by the Court, and you gave that answer didn't you? A. I did.

Q. How many acre-feet per year will 292 second-feet seeping continuously produce? A. 211,000 acre-feet.

Q. 211,000? A. Yes."

R. 1992, Testimony of Harry Barnes, Engineer for the Bureau of Reclamation, Rep. Tr. 16,974.

- (b) *All Parties in the District Court Agree That Eventually the Bureau of Reclamation Unless Enjoined by This Court May Attempt to Cut Down the Flow of Water Below Friant Dam to 60,000 Acre-Feet.*

That the Bureau eventually intends to cut down the annual flow of the San Joaquin River to 60,000 acre-feet per year is admitted by Witness Leland Hill of the Bureau,²⁴ although as will be hereafter shown respondents have discharged an average 626,000 acre-feet per year from Friant Dam to Gravelly Ford for nine years²⁵ beginning in 1951 in order to actually carry out their plan of physical solution.

- (c) *The District Court Found That the Percolating Water Rights of 200,000 Acres of the Alluvial Cone of the San Joaquin Would Be Damaged and 100,000 Acres of the Most Valuable Land in the San Joaquin River Would be Destroyed For Agricultural Use By the Construction and Proposed Operation of Friant Dam by Respondents Unless the Court's Plan of Physical Solution is Adopted.*

The District Court found that 100,000 acres of the alluvial cone of the San Joaquin would have its underground percolating water destroyed in event the physical solution proposed by the Court was not adopted.²⁶ The evidence in the case is that this valuable land was worth \$1,000.00 per acre. This would mean a total damage to the lands in the alluvial cone of the

²⁴R. 1981, Testimony of Leland K. Hill, 14,980.

²⁵1951-1952, 1952-1953, 1953-1954, 1954-1955, 1955-1956, 1956-1957, 1957-1958, 1958-1959, 1959-1960, U. S. Geological Survey, Water Supply Papers.

²⁶R. 938, Amended Finding 26-A.

San Joaquin River \$100,000,000.00. As will be discussed in a later chapter of this brief, should the respondents refuse to place the Court's plan of physical solution in operation and should this Court hold respondents could acquire these percolating water rights by either eminent domain or condemnation (as the lower Court erroneously stated they could do) this would cost the government alone for such a taking approximately \$100,000,000.00 or over one-half the cost of the Central Valley Project. There would also be additional damage for the destruction of the municipally owned wells of the City of Fresno. It is submitted that the performance of the Court's decree of physical solution, costing less than \$1,000,000.00 will not only save the government a very large sum of money, but would cut down the large flow of water the Bureau has had to release down the river since beginning operation of the Central Valley Project so that not only could the City of Fresno have the water they herein ask for, but no respondent district would have to take less water than their contract calls for.

The rights of the overlying landowners are considered analogous and equal to riparian rights and are therefore entitled to protection.²⁷

(d) *The Trial Court's Findings on the Extent of Percolation Into the Alluvial Cone and Damage to the Lands on the Alluvial Cone Under the Bureau of Reclamation's Plan of Physical Solution Were Sustained by the Court Below.*

The Court below affirmed the decision of the District Court holding that the waters of the San Joaquin River

²⁷*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 C. 2d 489, 45 P. 2d 972 (1935).

percolated throughout the alluvial cone of the San Joaquin prior to the construction of Friant Dam and that the 100,000 acres of land on said alluvial cone (valued at \$100,000,000.00) would be irreparably damaged and completely destroyed if the Court's plan of physical solution were not adopted.

6. The Record in This Case.

The complete record in this case is 50,000 pages. The trial before the District Court took nineteen months of continuous trial and two additional trial periods and the decision of the District Court involves 263 separate rulings—the largest number of points ever decided in a single case according to West's Publishing Company. The parties printed the material portion of the record but not all of the record in order to economize. The trial judge was dissatisfied with the record as printed and on the 31st day of March, 1959, in accordance with Rule 75(i), Federal Rules of Civil Procedure, ordered the entire remaining unprinted record to be made a part of the record and shipped it to the Ninth Circuit Court of Appeals. The Department of Justice appealed the District Court's order but did not perfect their appeal and therefore the District Judge's order became final. The unprinted portion of the record was generously quoted from by all parties before the Ninth Circuit. The entire record has been shipped to this Court by the Ninth Circuit Court of Appeals in accordance with the ruling of the District Judge. We would assume that the entire record could be referred to by any party in accordance with Rule 75(i). However, by stipulation dated June 26, 1962, signed by the United States and the undersigned and filed with this Court it was also provided

"that reference may be made by the parties in their brief and at argument to any unprinted portions of the certified record."

Due to the extreme length of the record, the many points of law unsolved and the complexity of the Central Valley Project we ask the Court's indulgence on the length of our brief.

7. The Era of Richard Boke.

Everything was going fine with the construction and operation of the Central Valley Project under the same great engineers of the Bureau who had constructed Hoover Dam, Bonneville Dam and the other great reclamation projects. The City of Fresno was relying on the promises of these outstanding men and the acts of Congress guaranteeing them water from the Central Valley Project. Then shortly after the first water was delivered under the Central Valley Project in 1944, to the City's great dismay, two incompetent and inexperienced men, who were not engineers nor administrators, were installed as Chief of the Bureau of Reclamation and Regional Director of the Central Valley Project in California, and captured control of the great Bureau of Reclamation. Boke was given exclusive power of executing the contracts and water releases in the Central Valley Project without necessity of contacting his superiors in any way.²⁸ These men,

²⁸Q. Mr. Boke, what is your official position with the United States Bureau of Reclamation? A. Regional Director, Bureau of Reclamation, for Region 2 Sacramento.

* * *

Q. Well, as far as the Bureau of Reclamation is concerned, and excluding flood control operations, have you full authority yourself to make any releases in the Central Valley Plan in California, at Friant or Shasta, as you deem necessary?

* * *

in violation of the original Feasibility Report covering the Central Valley Project and in violation of every act of Congress and the interpretations thereof by the federal courts, shortly after their appointment, began a consistent refusal to recognize rights of the City of Fresno to the water it was entitled to under the Central Valley Project as approved by Congress. In our discussion of Boke and Strauss we are not attacking these men personally, but simply want to point out that they were too inexperienced and unqualified to even begin to handle their respective jobs or to appreciate the magnificent group of engineers they headed, nor could they understand the will of Congress in regard to the Central Valley Project.

Immediately upon his employment as Chief of the Bureau of Reclamation, Strauss, at Boke's insistence, asked most of the great engineers of the Bureau of Reclamation, like Bashore who had constructed the Central Valley Project, and other great engineers of

The Court: What he is trying to get at is, the long and the short of it, every time you change the flow of Friant Dam here, you don't have to get the consent of the Secretary of the Interior?

The Witness: That is correct.

The Court: Or Mr. Strauss, the head of the Bureau?

The Witness: Not at all.

The Court: That determination is made here?

The Witness: Yes.

Q. (By Mr. Rowe): You remember having lunch in Washington on April 17, with Mr. Winton, sitting in the back of the room, and Mr. Earl Harris of Santa Cruz, do you not? A. Certainly.

Q. You made a statement at that time that you could do whatever you wanted in California, as far as contracting for water, setting up flows, and releasing water from a dam, didn't you?

A. That is generally my responsibility, yes.

Q. Yes, without appealing to any higher authority? A. Generally speaking, yes.

Testimony of Richard L. Boke, Rep. Tr. 599, 600.

the Bureau of Reclamation, who had constructed Hoover and Bonneville Dams, to get out.²⁹

Boke, the Regional Director of the Bureau of Reclamation for California, was not an engineer and a Congressional committee found that he did not have the qualification to administer the Central Valley Project.³⁰

The old Bureau Engineers who had successfully designed and constructed the Central Valley Project, Boulder Dam and the other great reclamation projects testified under oath that Boke and Strauss had completely wrecked the Bureau's great staff.³¹

²⁹"Mr. Hodson. Yes; there has been a very quiet but nonetheless bitter controversy raging within the Bureau ever since * * * between the so-called old-time career Bureau people and on their ideas of what the Bureau is supposed to be doing, and the new group which has taken over control and management of the Bureau * * * Mr. Comstock talked to Mr. Bashore in Denver. He said that he was called into the office and given his choice to retire or be *kicked out*—so he retired—and the reasons were he would not go along on this new thinking and these new plans that the Bureau was putting into effect." (emphasis ours)

Investigation of the Bureau of Reclamation, Dept. of the Interior, in the Executive Depts., House of Representatives, 80th Congress, 2nd Session, page 746.

³⁰"* * * your committee has reached the conclusions, based on incontrovertible evidence, Mr. Boke does not possess the qualifications necessary to administer the gigantic Central Valley Project."

Investigation of the Bureau of Reclamation, Dept. of the Interior, in the Executive Depts., House of Representatives, 80th Congress, 2nd Session, page 10 (August 4, 1948).

³¹"Mr. Blanks * * *. Throughout the period of reclamation history, there has been built up the greatest engineering organization the world has known. It is world-renowned. It is something that the people of this country can well be proud of. It is something that all of us have been proud to be connected with. That engineering organization under the present administration of the Bureau of Reclamation has been wrecked, practically wrecked. * * *"

Investigation of the Bureau of Reclamation, Dept. of the Interior, in the Executive Depts., House of Representatives, 80th Congress, 2nd Session, page 699.

Strauss, Chief of the Bureau of Reclamation, was equally criticized by Congress.³²

While the City of Fresno was attempting to get the water to which it was entitled from the Central Valley Project under the acts of Congress, Strauss, himself, due to their continual violation of the mandates of Congress, admitted that Congress no longer trusted either him, Boke, nor the Secretary of the Interior.³³

When Boke took over, he had an argument with some Fresno County officials. Thereafter he refused to act on any application from anyone in the County of Fresno, including the City of Fresno, for water from the Central Valley Project and illegally began the deliberate exclusion of the City of Fresno and the County of Fresno from the service area of the Central Valley Project and from any benefits from the Central Valley Project in direct violation of the will of Congress and the laws and statutes of the State of California.

³²Referring to Mike Strauss, Chief of the Bureau of Reclamation over Boke: "Senator Downey: Mike Strauss: Succeeding Bashore, he stepped down from a higher position so that he could enforce his will more directly. As ignorant of engineering, irrigation, and western conditions as any man could be, with no important administrative experience behind his entry into the government service, Mr. Strauss represents the zealot, the politician, the ideologist who lives by the manipulation of propaganda, freely dispatched at public cost: * * *."

Investigation of the Bureau of Reclamation, Dept. of the Interior, in the Executive Depts., House of Representatives, 80th Congress, 2nd Session, page 140.

³³"At the same Salt Lake City Conference (1947) Secretary Krug made the following statements: 'This program is probably closer to my heart than any other in the Department of the Interior and as Mike (Michael Strauss, Commissioner of the Bureau of Reclamation) pointed out to you, for some strange reason *people up in Congress don't trust us like they used to.* * * *'"

Investigation of the Bureau of Reclamation, 19th Intermediate Report of the Committee on Expenditures in the Executive Dept., August 7, 1948, House Report No. 2458, pp. 555-556.

Acting under the illegal recommendations of Boke, the then Acting Secretary of the Interior, Chapman, at the insistence of Boke, illegally and without authority of Congress, blandly announced in a letter dated February 24, 1947, that he was taking from the San Joaquin River between Friant Dam and Gravelly Ford Canal, a large portion of this vitally needed water from Fresno City and County, which water, under the original Feasibility Report of President Roosevelt, approved by Congress was only to be used as a supplemental supply, for municipalities and presently irrigated land *to illegally supply an additional 338,000 acres of dry, uncultivated and unirrigated land not intended to be supplied by water from the Central Valley Project under the original Feasibility Report nor by the acts of Congress authorizing and reauthorizing the project.*³⁴

Boke consistently refused to consider applications of San Joaquin Valley cities including the City of Fresno for municipal water out of the Central Valley Project and refused to make the customary investigation reports upon which a contract could be based. As a result of Boke's illegally giving water to uncultivated lands in the San Joaquin Valley which were to receive no water from the Central Valley Project under the Feasibility Report of December 2, 1935, which is the basis of the Central Valley Project, and as a result of his refusal to give water to cities of the San Joaquin Valley, the Bureau of Reclamation is now proposing to spend \$714,162,000.00 in an effort to bring in an additional supply of water to the *cultivated* lands which were legally entitled to the Central Valley

³⁴"Millerton Lake will also provide 1,256,500 acre-feet (Class I and II) to the upper (southern) San Joaquin Valley as a supply for approximately 338,000 acres of presently dry land * * *." (emphasis ours)

R. 309 (New Volume), Pltf. Ex. 136, 6570.

Project water which had been denied sufficient water by the illegal action of Boke. This new costly project if ever adopted would have a duplicate canal running alongside the present Friant-Kern Canal to furnish a supplemental water supply to the farms and cities illegally excluded by Boke from the Central Valley Project.³⁵

Boke thereafter negotiated and signed contracts with fifteen appellant irrigation and water districts³⁶ in an abortive attempt to use up all of the water of the Central Valley Project and thus *illegally exclude the City and County of Fresno* from obtaining the supply of vitally needed water to which they were entitled under the acts of Congress.

In July of 1951 after the original Central Valley Project had been completed, Boke, in spite of his con-

³⁵"The capital cost of the Government-constructed features including \$23,540,000 for enlargement of the Folsom-South Canal is estimated to be \$714,162,000. The distribution features will cost an additional \$181,450,000."

East Side Division, Central Valley Project, California, "A Report on the Feasibility of Water Supply Development", United States Department of the Interior, Bureau of Reclamation, January, 1962, page 48.

³⁶ Districts	Date of Contract with Bureau
Delano-Earlimart	8/11/51
Exeter	11/8/50
Ivanhoe	9/23/50
Lindmore	2/29/49
Lindsay-Strathmore	8/5/48
Lower Tule	5/1/51
Orange Cove	5/20/49
Porterville	1/28/52
Sausalito	2/13/51
S.S.J.M.U.D.	10/18/45
Stone Corral	12/13/50
Terra Bella	10/12/50
Tulare	10/18/50
Chowchilla	7/5/50
Madera	5/14/51"

Rank v. (Krug) United States, 142 F. Supp. 1, 137 (1956).

tinued representations to Congress³⁷ and to the farmers along the river between Friant Dam and Gravelly Ford Canal, carried out his threats to dry up the river below Friant Dam and dried up many of the main channels of the San Joaquin River between Friant Dam and Gravelly Ford Canal along which the named plaintiffs' lands were located as shown by the following picture of J. E. Cobb, one of the named plaintiffs (Exhibit III of this brief), [Pltf. Ex. 148, Rep. Tr. 6612] in the dry river bed.

EXHIBIT III.



Plaintiff J. E. Cobb in dry river bed after Boke dried the river.

³⁷"There are certain existing rights downstream from Friant which have to be supplied. Including the riparian rights on the river between Friant Dam and Mendota Pool, water needed for preservation of fish life and waterfowl, and losses from evaporation and seepage in the reservoirs and canals, it has been determined that 150,000 acre-feet of Class I water must be reserved to meet those requirements." (emphasis ours)

R. 2284, Pltf. Ex. 121, Testimony of U.S.B.R. Engineer Stoner on Hearings before a Subcommittee of the Committee on Public Lands, United States Senate, 80th Congress, 1st Session on S-912, p. 708, Rep. Tr. 3072.

The named plaintiffs on July 26, 1951, asked the District Court for a temporary injunction to restrain Boke from illegally drying up the river.

After hearing on this motion for a temporary injunction, the District Court on August 29, 1951, entered a consent restraining order³⁸ *with the consent of all parties*, including the attorney for the United States Department of Justice representing the respondent Bureau of Reclamation officials.³⁹ These orders restrained the impounding of water by defendants unless sufficient water was allowed by respondent officials to flow down the San Joaquin River to supply the needs of the plaintiffs. They were complied with by all parties until the government revoked its consent and the court below sustained such revocation. However, in spite of this revocation, respondent officials have continued to let water run down the river to Gravelly Ford Canal. This consent decree will be further discussed in a subsequent sub-chapter of this brief under the heading "History of Litigation."

A picture of Mr. Cobb (Exhibit IV of this brief) [Pltf. Ex. 149, Rep. Tr. 6612] standing in the same place in the river after the consent restraining order of August 29, 1951, follows:

³⁸This order also required the installation of automatic water level recorders on 25 or more wells in the alluvial cone, the location of which were to be selected by agreement among the experts of the parties. This was done, and the results were introduced in evidence.

³⁹* * * the plaintiffs and defendant officials of the United States and the State of California having consented, and no other parties having objected to the entry of this order * * *

Temporary Restraining Order of August 29, 1951, signed by District Judge Pierson M. Hall.

EXHIBIT IV.



Mr. Cobb after consent decree of August 29, 1951.

B. Legislative History of the Central Valley Project.

1. The Central Valley Project Was First Authorized as a State of California Undertaking.

The Central Valley Project was first authorized as a State of California undertaking by the Legislature in 1933, (Cal. Stats. 1933, 1042) ratified by a vote of

the people and became effective January 13, 1934. It is now codified as part of the California Water Code.⁴⁰

The Central Valley Plan of the State is set out in Report No. 3 of the California Water Project Authority of the State of California.

As heretofore stated, this report expressly provides that the water to be taken from the San Joaquin River for diversion through Friant-Kern Canal and Madera Canal covered only those water rights of the owners below Gravelly Ford Canal and upstream from the Merced River.⁴¹

⁴⁰"The Central Valley Project was authorized as a state undertaking in the enactment of the Legislature of the Central Valley Project Act of 1933 (Stats. 1933, Ch. 1042), and the subsequent approval of the act by the electors, on referendum, at a special state-wide election. The act became effective January 13, 1934, and is now codified as Division 6, Part 3 of the Water Code. The act authorized and adopted the Central Valley Project for construction as a state project, created the Water Project Authority to construct, operate and administer the project, and authorized the financing thereof by issuance of revenue bonds in the maximum amount of \$170,000,000."

Bulletin No. 2, "Feasibility of State Ownership and Operation of the Central Valley Project of California", Earl Warren, Governor, March, 1952, page 18.

⁴¹"Definition of Rights to the Waters of the San Joaquin River Proposed For Diversion to Upper San Joaquin Valley:

"Introduction: This report presents a definition of the rights to San Joaquin River water which it is assumed appertain to lands receiving water from the river between the Gravelly Ford Canal and Merced River. Under the Central Valley Project, it is proposed to acquire (by purchase, exchange, and appropriation) the right to utilize the waters of the San Joaquin River inhering in these rights, * * *"

Pltf. Ex. 410, Report No. 3, "Definition of Rights to the Waters of the San Joaquin River Proposed for Diversion to Upper San Joaquin Valley", Charles H. Lee, Consulting Engineer, August, 1936, Water Project Authority. State of California, Page 1, Rep. Tr. 23,206.

- (a) *The Central Valley Project as Authorized by the People and Legislature of the State of California Specifically Provided that Domestic Use of Water was a Primary Purpose of the Project.*

"Purposes. Friant Dam shall be constructed and used primarily for improvement of navigation, flood control, and storage and stabilization of the water supply of the San Joaquin River, for irrigation and *domestic use*, and secondarily for the generation of electric power and other beneficial uses. (p. 1896.)" (emphasis ours)

California Water Code, Section 11226.

Primary purposes. Shasta Dam shall be constructed and used primarily for the following purposes:

"* * *

"(d) Storage and stabilization of the water supply of the Sacramento River for irrigation and *domestic use*." (emphasis ours)

California Water Code, Section 11207.

- (b) *Due to Inability to Finance the Project the State of California Applied to the Federal Government to Take Over the Construction of California's Central Valley Project as a Federal United States Bureau of Reclamation Project.*

At the 1935 session of Congress California's congressional representatives asked that Congress authorize and finance the Central Valley Project.⁴²

⁴²"At the 1935 Session of the Congress, California's congressional representatives introduced legislation to provide for federal authorization and financing of the Central Valley Project."

Bulletin No. 2, "Feasibility of State Ownership and Operation of the Central Valley Project of California", Earl Warren, Governor, March, 1952, page 19.

2. **The Central Valley Project Was Taken Over by the United States in the Year 1935 and Reauthorized by Congress as a Reclamation Project in 1937.**

The Central Valley Project was first authorized as a federal project under the Emergency Relief Appropriation Act of August 30, 1935, 49 Stat. 1028-1038,⁴³ in accordance with the following statutory procedure.

Section 4 of the Act of Congress of December 5, 1924, 43 Stat. 672, 702, provides that no reclamation project should be constructed under the Basic Reclamation Act of June 17, 1902 (32 Stat. 388), until the reclamation project had been set forth in detail in a feasibility report.

"Subsec. B. That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineer-

⁴³"A proposal was presented to the Secretary of the Interior and the President of the United States, providing for the construction of the Central Valley Project as a federal reclamation project, funds to be provided for construction from those available under the Emergency Relief Appropriation Act of 1935 (49 Stat. 1028, 1038). This proposal was approved and on September 10, 1935, the President allocated \$20,000,000 to start construction on the project, with the Bureau of Reclamation as the construction agency. The executive order stipulated that the funds should be used for Friant Reservoir and certain other facilities to be chosen, the combined cost of which was not to exceed \$20,000,000. The order also provided that the funds were to be reimbursable in accordance with the reclamation laws, which by precedent was interpreted to mean that repayment contracts would be required before construction could begin. The order was subsequently modified on November 16, 1935, making \$15,000,000 available for the project, permitting construction on any of its units and waiving the execution of repayment contracts prior to beginning of construction."

Bulletin No. 2, "Feasibility of State Ownership and Operation of the Central Valley Project of California", Earl Warren, Governor, March, 1952, page 19.

ing features, the cost of construction, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes and that it will probably return the cost thereof to the United States."

Act of December 5, 1924, 43 Stat. 672, 702.

Pursuant to said Act of December 5, 1924, hereinabove referred to, and the request of the State of California, Secretary Ickes approved and submitted to President Roosevelt the Feasibility Report on the Central Valley Project and on December 2, 1935, President Roosevelt officially approved the same, thereby determining the basic features of the Central Valley Project.⁴⁴ The Feasibility Report dated December 2, 1935, is set forth in Appendix "D" of this brief, page 20. This Feasibility Report is also found in Appendix "C" in *Rank v. Krug*, 90 F. Supp. 773, 823 (1950). Congress authorized the original California Central Valley Project as set forth in the Feasibility Report signed by President Roosevelt on December 2, 1935.

The Central Valley Project was again reauthorized as a reclamation project by the Act of August 26, 1937, 50 Stat. 844, 850, which specifically provided that the project should be for irrigation and DOMESTIC purposes.⁴⁵

⁴⁴"On December 2, 1935, the President also approved a report of the Secretary of the Interior, dated November 26, 1935, declaring the project to be feasible from engineering, agricultural, and financial standpoints, approving and recommending its construction, and recommending the project as a federal reclamation enterprise."

Bulletin No. 2, "Feasibility of State Ownership and Operation of the Central Valley Project of California", Earl Warren, Governor, March, 1952, page 19.

⁴⁵See Appendix "D."

This Court has held that the Feasibility Report by the President dated December 2, 1935, is the basis and continued to be the basis of the Central Valley Project as authorized and reauthorized by Congress.

"But it also is true, as pointed out by claimants, that in these Acts Congress expressly 'reauthorized' a project already initiated by President Roosevelt, who, on September 10, 1935, made allotment of funds for construction of Friant Dam and canals under the Federal Emergency Relief Appropriation Act, 49 Stat. 115, 118, Section 4, and provided that they 'shall be reimbursable in accordance with the reclamation laws.' A finding of feasibility, as required by law, was made by the Secretary of the Interior on November 26, 1935, making no reference to navigation, and his recommendation of 'the Central Valley development as a Federal reclamation project' was approved by the President on December 2, 1935."

United States v. Gerlach Live Stock Co., 339

U. S. 725, 731-732, 70 S. Ct. 955, 958-959,
94 L. Ed. 1231 (1950).

**3. The Central Valley Project as a Bureau of
Reclamation Project.**

(a) *The Basic Reclamation Act of June 17, 1902.*

The Basic Reclamation Act of June 17, 1902, 32 Stat. 388, 390, provided as follows:

"Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the

Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." (emphasis ours)

Act of June 17, 1902, 32 Stat. 388, 390 (43 U. S. C. 391).

Section 8 of the Basic Reclamation Act of June 17, 1902, was again repassed by Congress in 1956 as part of the Central Valley Project laws.⁴⁶

(b) *The Central Valley Project Provided Water for the Counties of Merced, Madera, Fresno, Kings and Kern, Including the City of Fresno.*

⁴⁶"Sec. 4. Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

"Sec. 5. This Act shall be a supplement to the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto).

"Approved July 2, 1956."

Act of July 2, 1956, 70 Stat. 483, 484.

The Feasibility Report specifically provided that the water from Friant Dam, one of the principal features of the Central Valley Project, was to serve "DEVELOPED LANDS" in the counties of Merced, Madera, Fresno, Tulare, Kings, and Kern, including the City of Fresno."

(c) *No New Agricultural Lands Were to be Brought into Cultivation.*

"The project is *not* designed for bringing new lands into cultivation, but for the maintenance of *existing* agricultural development and existing civilization of a high type." (emphasis ours)

Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935, Appendix "D" hereof.

"The economic values of the project are of great magnitude. *The project will not bring into*

"Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve *developed* irrigated lands in an area extending from Madera County on the north to Kern County on the south." (emphasis ours)

Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935, Appendix "D" hereof.

"Prior to December 2, 1935, the defendant through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land nonriparian to the river, situated both to the north and south of Friant in the counties of Madera, Merced, *Fresno*, Tulare, Kings, and Kern in the State of California." (emphasis ours)

Gerlach Live Stock Co. v. United States, 111 C. Cls. 1 at 27, Aff. 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

"7. The plan as formulated by defendant involved the irrigation of a large area of privately owned land nonriparian to the river situated both to the north and south of Friant in the California counties of *Madera, Merced, Fresno, Tulare, Kings and Kern*" (emphasis ours)

Wolfson v. United States, 162 F. Supp. 403 (1958).

production new agricultural areas but will maintain present values and civilization."

Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935, Appendix "D" hereof.

(d) *The Central Valley Project Provided Water for Domestic and Municipal Uses.*

(aa) The Feasibility Report of December 2, 1935, Upon Which the Central Valley Project Act is Based, Also Provided That the Central Valley Project Was to Furnish Water for Domestic, Industrial and Municipal Purposes.

"The Central Valley Project embodies a plan * * * to provide urgently needed water supplies for existing * * * *industrial and municipal* developments in the Sacramento and San Joaquin Valleys and upper San Francisco Bay region * * *." (emphasis ours)

Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935, Appendix "D" hereof.

(bb) Congress Specifically Provided That the Central Valley Project Should Furnish Water for Domestic and Municipal Uses.

Congress, by the Act of April 16, 1906, specifically authorized the furnishing of municipal water from reclamation projects to cities within the immediate vicinity of any reclamation project and specifically provided that rates for municipal water should not be lower than that charged for agricultural water, clearly

indicating that Congress did not intend that cities pay more for water.⁴⁸

Fresno lies within a few miles of Friant Dam and the Friant-Kern Canal. It is clearly within the immediate vicinity of the Central Valley Project.

The Act of August 26, 1937, 50 Stat. 844-850, reauthorizing the Central Valley Project as a reclamation project expressly provided that the Central Valley Project should furnish water for *domestic* use.

"* * * that the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; second, for *irrigation and domestic uses*; and third, for power."
(emphasis ours)

Act of August 26, 1937, 50 Stat. 844, 850

Other acts followed specifically recognizing that the Central Valley Project was for and reauthorized for *domestic* and *municipal* purposes. Among these acts is Section 9(c) of the Reclamation Project Act of August 4, 1939, 53 Stat. 1187, 1194,⁴⁹ which

⁴⁸"Sec. 4. That the Secretary of the Interior shall * * * and may enter into contract with the proper authorities of * * * towns or cities on or in the immediate vicinity of irrigation projects, which shall have a water right from the same source as that of said project for the delivery of such water supply to some convenient point, and for the payment into the reclamation fund of charges for the same to be paid by such towns or cities, which charges shall not be less nor upon terms more favorable than those fixed by the Secretary of the Interior for the irrigation project from which the water is taken." (emphasis ours)

Act of April 16, 1906, 34 Stat. 116-117.

⁴⁹"(c) The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract, either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding

specifically provides that the Secretary of the Interior is authorized to enter into contracts with municipalities for a municipal water supply providing for a return of construction costs only in forty years with the Secretary to have the power at his option to charge interest at a rate not to exceed $3\frac{1}{2}$ per cent per annum or that he may enter into a sale contract for water to municipalities for periods not to exceed forty years at rates sufficient to at least cover a *proportionate* share of the construction costs, annual operation and maintenance costs and a proportionate share of the fixed charges. This is also the ruling of this Court.⁵⁰ (cc) This Court Has Also Found That the Central Valley Project Was to Furnish Water for Domestic and Municipal Purposes.

"The Central Valley basin development * * * includes * * * water * * * for *municipal* and miscellaneous purposes including *cities* * * *." (emphasis ours)

United States v. Gerlach Live Stock Co., 339 U. S. 725, 733, 70 S. Ct. 955, 959, 94 L. Ed. 1231 (1950).

the rate of $3\frac{1}{2}$ per centum per annum if the Secretary determines an interest charge to be proper, of an *appropriate share* as determined by the Secretary of that part of the *construction* costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an *appropriate share of the annual operation* and maintenance cost and an *appropriate share of such fixed charges as the Secretary deems proper*, and shall require the payment of said rates each year in advance of delivery of water for said year."

Act of August 4, 1939, 53 Stat. 1187, 1194.

⁵⁰* * *. This project anticipates recoupment of its cost over a forty-year period."

United States v. Gerlach Live Stock Co., 339 U. S. 725 752-753, 70 S. Ct. 955, 969, 94 L. Ed. 1231 (1950).

"The object of the plan is to arrest the flow and regulation its seasonal and year to year variations thereby creating salinity control to avoid the gradual encroachment of ocean water, providing an adequate supply * * * for *municipal* and irrigation purposes." (emphasis ours)

Ivanhoe Irrigation District v. McCracken, 357 U. S. 275, 281; 78 S. Ct. 1174, 1179, 2 L. Ed. 2d 1313 (1958).

(dd) Rulings of California Administrative Agencies.

The California Administrative Agency empowered to grant permits to appropriate water of the San Joaquin has held appellant City of Fresno is in the service area of the Central Valley project.

"Both the City of Fresno and the Fresno Irrigation District are, and always have been, since the formulation of general plans for the Central Valley Project, fairly within the service area of the Central Valley Project."

State of California, State Water Rights Board,
Decision No. D 935, Adopted June 2, 1959,
p. 68.

(e) *The Central Valley Project Also Provided Water for the Riparian and Percolating Water Users Along the 38-Mile Stretch of the San Joaquin River Between Friant Dam and Gravelly Ford Canal.*

Appellant City of Fresno's interest in the 38-mile stretch of lands between Friant Dam and Gravelly Ford Canal is because the City of Fresno obtains a large part of its municipal water supply from the San

Joaquin River waters percolating into the alluvial cone⁵¹ of the San Joaquin River upon which are located many wells of the City of Fresno's municipal water department—percolating waters from a stream under California laws having the same or analogous rights to riparian rights (*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 C. 2d 489, 45 P. 2d 972 (1935)) and because the City is a named plaintiff in this action along with other named plaintiffs, it represents as a class action those owners between Friant Dam and Gravelly Ford Canal and the other land-owners on the alluvial cone of the San Joaquin.

The United States Bureau of Reclamation's take-over of the Central Valley Project always provided water to satisfy the riparian and percolating water rights between Friant Dam and Gravelly Ford Canal, a point 38 miles downstream on the San Joaquin River from Friant Dam.

"9. (a) Defendant's plan, as modified contemplated among other things, that the United States should eventually store and divert to nonriparian use the waters of the San Joaquin River originating above Friant Dam and formerly flowing at or below Gravelly Ford, except for releases from Friant * * *⁵² to satisfy riparian rights between Friant and Gravelly Ford; * * *." (emphasis ours)

Wolfsen v. United States, 162 F. Supp. 403, 410 (1958).

⁵¹The alluvial cone of the San Joaquin is shown as the area within Lee's Line on Exhibit 2 of this brief.

⁵²"Senator Downey: What Unit is this? Is this Millerton Reservoir?"

"Mr. Stoner: This is just Millerton now. Finally, in order to determine from the above a definite figure for the project irrigation supply in the southern San Joaquin Valley, considera-

The Bureau of Reclamation always represented to Congress and to the plaintiff landowners between Friant Dam and Gravelly Ford Canal that there would always be water for their riparian and percolating water rights under the Central Valley Project.⁵³

As stated the Bureau officials also publicly represented to the landowners between Friant Dam and Gravelly Ford Canal that they were to receive as much or more water after the construction of Friant Dam than they had received before.⁵⁴ This Court also found

tion must be given to the water commitments downstream on the San Joaquin River, and to evaporation and seepage losses.

"There are certain existing rights downstream from Friant which have to be supplied. Including the riparian rights on the river between Friant Dam and Mendota Pool, water needed for preservation of fish life and waterfowl, and losses from evaporation and seepage in the reservoirs and canals, it has been determined that 150,000 acre-feet of Class I water must be reserved to meet those requirements." (emphasis ours)

R. 2284 Pltf. Ex. 121, Testimony of U. S. B. R. Boke's Engineer Stoner on Hearings before a Sub-committee of the Committee on Public Lands United States Senate, 80th Congress, 1st Session on S-912; page 708, Rep. Tr. 3072.

⁵³R. 295 (New Volume), Deft. Ex. A-79-A, 21,975.

⁵⁴"Kelly and Webb declared they are positive no such situation will arise; that the Central Valleys Project will be completed as a whole; *that no present owner of water rights in the San Joaquin will be deprived of any water* and that the California Water Authority will guard zealously the rights of all property owner." (emphasis ours)

R. 332, Pltf. Ex. 161, Excerpt from article from Fresno Bee dated February 5, 1937.

"By Mr. Rowe: Q: Prior to the construction of Friant Dam, did you attend any meetings with some of the irrigation districts in the south part of the valley, and state officials and Bureau of Reclamation officials?

"A: Yes, a good many meetings. * * *

* * *

"The Witness: Well, at Sacramento we met with Mr. Young, Hyatt was for the State, Van Etten and Edmundson, Mr. Kelly was the Department of Public Works, I believe, and Mr. Webb was the Attorney General at the time, U. S. Webb, I believe it was.

* * *

that the Feasibility Report dated December 2, 1935, is the basis of congressional legislation approving the Central Valley Project as a federal reclamation project.⁵⁵ As will be shown later in our discussion of the law the contention of opposing counsel that the riparian and percolating water rights of the plaintiffs in the 38-mile stretch of the San Joaquin River between Friant Dam and Gravelly Ford Canal have been taken by either eminent domain or condemnation is entirely unfounded, unsubstantiated by any public document, Act of Congress or decision of the federal courts and is wholly a creature of the imagination of opposing counsel.

(f) *The Central Valley Project Provided for the Substitution of Sacramento River Waters Through the Delta-Mendota Canal for All Crop Lands Served Out of the Mendota Pool Including Tranquillity Irrigation District and the Old Miller and Lux Interests.*

“* * * the plan as originally adopted and as carried out by the Bureau included replacement * * *

“Q: Well, what did Mr. Young and Mr. Kelly tell you?

“* * *

“The Witness: We were told we would have a large flow of well-regulated water; that the Government wouldn't take something away from one farmer and give it to another; and they told us always they were taking nothing but the overflow flood water, and we had the best water rights in the country, and they would protect them.”

Testimony of Witness J. E. Cobb, Rep. Tr. 6630 to 6632.

⁵⁵“A finding of feasibility, as required by law, was made by the Secretary of the Interior on November 26, 1935, making no reference to navigation, and his recommendation of ‘the Central Valley development as a Federal reclamation project’ was approved by the President on December 2, 1935.”

United States v. Gerlach Live Stock Co., 339 U. S. 725, 732, 70 S. Ct. 955, 959, 94 L. Ed. 1231 (1950).

of all water formerly used for crops * * *, (emphasis ours)

United States v. Gerlach Live Stock Co., 339 U. S. 725, 740, 70 S. Ct. 955, 963, 94 L. Ed. 1231 (1950).

"Delta-Mendota Canal will carry surplus Sacramento River water 120 miles southerly from the Delta to *Mendota Pool* on San Joaquin River. Here the water will be used to meet the demands of *crop lands* now irrigated by diversions from San Joaquin River." (emphasis ours)

R. 326 (New volume), "Comprehensive Plan for Water Resources Development, Central Valley Basin, California," United States Department of the Interior, Harold L. Ickes, Secretary, Project Report No. 2-4.0-3, November, 1945, page 7.

"1. Water rights appertaining to crop lands irrigated by controlled diversions, the right of utilization of the water inhering in which it is proposed to acquire by exchange for a substitutional water supply furnished by and through the San Joaquin Pumping System of the Central Valley Project."

Pltf. Ex. 410, Report No. 3, "Definition of Rights to the Waters of the San Joaquin River Proposed for Diversion to Upper San Joaquin Valley". August, 1936, page 1, Rep. Tr. 23,206.

(g) *Only Uncontrolled Grasslands Water Flowing Over the Lands Onto Uncultivated Pasture Lands at High Water or Flood Flow Was to Be Taken by Eminent Domain.*

The uncontrolled flows of the San Joaquin River during high flows of the river over its banks, commonly called uncontrolled grassland water, were to be taken by condemnation or eminent domain.⁵⁶

4. Water Rights of Tranquillity Irrigation District.

Tranquillity Irrigation District is one of the oldest irrigation districts in the state. Incorporated in 1917 it has a gross area of 10,750 acres and a net irrigable area of 9,076 acres and is located 30 miles west of Fresno. The District is bounded on its north and east sides by Fresno Slough, an arm of bay of the San Joaquin River⁵⁷ which is also a part of Mendota Pool.

⁵⁶"3. Rights to uncontrolled flow which it is proposed to acquire by appropriation or, where necessary or proper, by compensating such interests (assumedly chiefly owners of riparian lands subject to overflow) as may prove to have valid claims thereto, or by both such methods."

Pltf. Ex. 410, page 1, Report No. 3, "Definition of Rights to the Waters of the San Joaquin River Proposed for Diversion to Upper San Joaquin Valley", Charles H. Lee, Consulting Engineer, August, 1936, Rep. Tr. 23,206.

"Uncontrolled grass lands involved in the claims are parts of a large riparian area which benefits from the natural seasonal overflow of the stream. * * *. Their claim of right is, in other words, to enjoy natural, seasonal fluctuation unhindered, which presupposes a peak flow largely unutilized.

"The project puts an end to all this. * * *. Unlike the supply utilized for nearby crop and 'controlled' lands, the vanishing San Joaquin inundation cannot be replaced with Sacramento water. Claimants have been severally awarded compensation for this taking of their annual inundations. * * *"

United States v. Gerlach Live Stock Co., 339 U. S. 725, 730, 70 S. Ct. 955, 958, 94 L. Ed. 1231 (1950).

⁵⁷*Miller & Lux v. Enterprise Canal, etc., Co.*, 169 C. 415, 147 P. 567 (1915).

Most of the following described rights of Appellee Tranquillity Irrigation District are riparian rights. It also has a small amount of prescriptive rights which are recognized by the Bureau of Reclamation and will not be treated separately in this brief.

By old court decrees Tranquillity Irrigation District was decreed 12% in excess of 1360 second feet of the natural flow of water of the San Joaquin River entering Mendota Pool. This right was recognized by contract between the district and Miller & Lux and its subsidiary companies,⁵⁸ which the Bureau of Reclamation admittedly assumed. The trial court again decreed Tranquillity Irrigation District its long recognized right to 12% of all water above 1360 acre feet of the natural flow of the San Joaquin entering Mendota Pool in accordance with the formula for determining the same used by the Bureau of Reclamation at the time of the trial in the District Court,⁵⁹ and *which formula has been continually and successfully used by the Bureau of Reclamation and Tranquillity Irrigation District without friction or objection since the close of the trial before the lower court in December of 1954.*

The lower court gave the United States the right to substitute an equal amount of waters from the Delta-Mendota Canal (which empties into Mendota Pool from which Tranquillity Irrigation District pumps its riparian water) for the natural flow of the San Joaquin to which finding no one has objected. That the Bureau of Reclamation must replace at its own expense and without deduction any waters taken from the Tran-

⁵⁸R. 2300-2306, Pltf. Ex. 271, 21,963.

⁵⁹R. 2307-2308, Pltf. Ex. 409-A, 23,199.

quillity Irrigation District, clearly appears from the following statement of this court in *United States v. Gerlach Live Stock Co., supra*.

"* * * the plan as originally adopted and as carried out by the Bureau included replacement at great expense of all water formerly used for crops and 'controlled grasslands', * * * (emphasis ours)

United States v. Gerlach Live Stock Co., 339

U. S. 725, 740, 70 S. Ct. 955, 963, 94 L. Ed. 1231 (1950).

"*Delta-Mendota Canal* will carry surplus Sacramento River water 120 miles southerly from the Delta to *Mendota Pool* on San Joaquin River. Here the water will be used to meet the demand of crop lands now irrigated by diversions from *San Joaquin River*." (emphasis ours)

R. 326 (New Volume) "Comprehensive Plan for Water-Resources Development, Central Valley Basin, California," United States Department of the Interior, Harold L. Ickes, Secretary, Project Report No. 2-4.0-3, November, 1945, page 7.

At the hearing before the court below all counsel frankly stated there was *no argument* over the right of Tranquillity Irrigation District and that both the Bureau of Reclamation and Tranquillity Irrigation District were proceeding in accordance with the formula of the Bureau above mentioned.

"1. Also intervening as plaintiff was the Tranquillity Irrigation District. This court is now advised that the dispute between this irrigation district and the Bureau of Reclamation has been re-

solved by agreement and no longer constitutes an issue upon appeal."

State of California, United States of America v. Rank, 293 F. 2d 340, 342 (1961). (Footnote 1)

C. Law of California Water Rights Summarized.

An excellent summary of the law of California Water Rights appears in the Decision of the lower court in *Rank v. (Krug) United States*, 142 F. Supp. 1, 105, 121 (1956), however for the convenience of this Court we will here briefly summarize the important points of California water law involved in this case.

1. Domestic and Municipal Use of Water Have the Highest Priority in California and Are Entitled to Preference Above Irrigation Use.

Both the California Supreme Court and the California Legislature have approved the doctrine that domestic use of water takes precedence over every other use and that irrigation use is secondary to this use.⁶⁰

This is also the established policy of the Legislature⁶¹

⁶⁰"(9) Without question the authorities approve the use of water for domestic purposes as first entitled to preference. That use includes consumption for the sustenance of human beings, for household conveniences, and for the care of livestock.

Prather v. Hoberg, 24 C. 2d 549, 562, 150 P. 2d 405 (1944).

"(9) It should be the first concern of the court in any case pending before it and of the department in the exercise of its powers under the act to recognize and protect the interests of those who have prior and paramount rights to the use of the waters of the stream. *The highest use in accordance with the law is for domestic purposes, and the next highest use is for irrigation.*" (emphasis ours)

Meridian, Ltd. v. San Francisco, 13 C. 2d 424, 450, 90 P. 537, 91 P. 2d 105 (1939).

⁶¹"Sec. 106. *Highest Uses of Water; domestic; irrigation.* It is hereby declared to be the established policy of this State that

This priority of domestic and municipal water we submit is binding on the United States in its use of water under the Central Valley Project.⁶²

2. The California County of Origin and Watershed of Origin Protective Statutes.

It is a fundamental rule and policy of both the California Legislature and the State of California Supreme Court that the counties and watersheds in which water originates shall have reversed to them sufficient water for their present and future needs before water

the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation." (Enacted 1943.)

California Water Code, Section 106.

"Sec. 1460. *Municipal Priority.* The application for a permit by a municipality for the use of water for the municipality or the inhabitants thereof for domestic purposes shall be considered first in right irrespective of whether it is first in time." (Enacted 1943.)

California Water Code, Section 1460.

⁶²7. The Reclamation Act of 1902, 32 Stat. 388, as amended, 43 U. S. C. Section 371 *et seq.*, 43 U. S. C. A. Section 371 *et seq.*, to which Congress adverted, applies only to the seventeen Western States. * * * *To the extent that it is applicable this clearly leaves it to the State to say what rights of an appropriator, or riparian owner may subsist along with any federal right.*" (emphasis ours)

United States v. Gerlach Live Stock Co., 339 U. S. 725, 734, 70 S. Ct. 955, 960, 94 L. Ed. 1231 (1950).

"Sec. 38. *Preferred Uses.*—It has been declared by both the courts and the legislature to be the established policy of this state that use for domestic purposes is the highest use of water and that the next highest use is for irrigation. These preferred uses are made part of the policy of the state applicable to state boards in acting on applications to appropriate water under the Water Commission Act. And it is the policy of the state that the rights of municipalities to acquire and hold rights to the use of water for existing and future uses are to be protected to the fullest extent necessary. The general state policy set forth in these statutes declaring domestic and municipal uses to be the highest and best uses are propositions of substantive laws, binding on state officials charged with supervision of water appropriation, and on appropriators, including the United States."

51 Cal. Jur. 2d 498.

is exported out of the county and watershed of origin for use elsewhere and that damages may not be substituted for water.⁶³

Moreover, Congress by the Act of October 14, 1949, 63 Stat. 852, 853, specifically required the Secretary of the Interior to proceed in accordance with county and watershed of origin laws in the operation of the Central Valley Project.⁶⁴

⁶³"Central Valley Project.—In the construction and operation by the authority of any project under the provisions of this part a watershed or area wherein water originated, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom shall not be deprived by the authority directly or indirectly of the prior rights to all of the water reasonably required to adequately supply the beneficial needs of the watershed area or any of the inhabitants, or property owners therein."

California Stat. 1933, Chap. 1042 as amended by Calif.

Stat. 1943, Chap. 368.

"* * * And a city furnishing water for domestic and municipal uses to its inhabitants, and being in the watershed and county of origin, is in a preferred position to either the *United States*, as an appropriator under the State Water Plan, or any irrigation or water district." (emphasis ours)

51 Cal. Jur. 2d 503;

Miller v. Bay Cities Water Co., 157 C. 256, 107 P. 115, 27 L. R. A., N. S. 772 (1910).

"* * * Whatever may have been the intent of the Legislature in adopting these statutes we cannot conclude that it was intended thereby to deprive *areas such as the City of Fresno* and the Fresno Irrigation District of a source of water supply so readily accessible to them as that obtainable from the San Joaquin River. Rather, we believe that *the Legislature in adopting 'Watershed Protection' Sections 11460-11463 and 11128 and 'County of Origin' Sections 10500, 10504 and 10505, was expressing a policy that areas such as the City and the District, both highly developed and well-established, located almost at the very outlet-works of Friant Dam, should not incur deficiencies in supply such as they are now suffering while water is transported past them to distant undeveloped lands.*" (emphasis ours)

State of California, State Water Rights. Board Decision No. D 935, Adopted June 2, 1959.

⁶⁴"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, that the Central Valley Project, California, authorized by section 2 of the Act of

A further and more complete discussion of the California watershed and county of origin protective statutes will be made on the subsequent chapter in this brief entitled "The Lower Court Erred in Holding that Respondent Officials Could Take the Water Needed by Fresno City which Lies in Both the County and Watershed of Origin of the San Joaquin River by Either Eminent Domain or Condemnation."

3. Statutory Procedure to Appropriate Surplus Waters in California.

Since 1913 the only way to appropriate surplus water in California is to file an application to appropriate with the California Water Rights Board.

The California Water Commission Act as adopted in 1913, Cal. Stats. 1913, p. 1012, and as variously amended thereafter, was codified in 1943 as part of the California Water Code.

The portion of the Water Code relating to applications to appropriate water is Part 2 of Division 2 of the Water Code, Sections 1200 to 1801 inclusive.

The general scheme of Part 2 of Division 2 of the Water Code provides for the filing of an application to appropriate, the giving of a notice of hearing, the holding of a hearing, the granting of the permit, to be followed by construction of diversion works, and upon

Congress of August 26, 1937 (50 Stat. 850), is hereby re-authorized * * *

"Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the USE OF WATER IN ACCORD WITH STATE WATER LAWS, INCLUDING BUT NOT LIMITED TO SUCH LAWS GIVING PRIORITY TO COUNTIES AND AREAS OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (emphasis ours)

Act of October 13, 1949, 63 Stat. 852, 853.

the completion of diversion works, to be followed by a license from the State of California. License is always made "subject to vested rights" which includes those of the named plaintiffs and the City of Fresno.

(a) *Change of Point of Diversion.*

No change of point of diversion of the appropriated waters of a California stream may be made without license from the California Water Rights Board and then only if "the change will not operate to the injury of any legal user of the water involved".

California Water Code, Secs. 1701, 1702.

4. **Rights of Riparian Owners, Appropriative and Prescriptive Owners Before the 1928 California Amendment to the Constitution.**

Some states follow the law of riparian water rights. Other states follow the law of appropriative water rights. Until 1928, California followed a mixture of both appropriative and riparian water rights. A concise statement of the law of California water rights is set forth by this Court in *Gerlach Live Stock Co. v. United States*, 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950), and by the District Judge in this case in *Rank v. (Krug) United States*, 142 F. Supp. 1, 115-130 (1956).

Prior to 1928 in California a riparian owner could claim the full flow of the river past his property irrespective of whether he could put the flow to beneficial use. *Herminghaus v. Southern California Edison Company*, 200 C. 81, 252 P. 607 (1926); *Miller v. Bay Cities Water Co.*, 157 C. 256, 107 P. 115, 27 L. R. A., N. S. 772 (1910). The Central Valley Project could not have been built under such a law as set forth in these decisions.

5. Rights of Overlying Landowners to Underground Water Percolating From Streams.

In California the owners of lands overlying percolating water stratas fed from a stream have the same right to continued seepage from the stream as a riparian owner.⁶⁵

The San Joaquin River in the state of nature before restricted by Friant Dam had percolated 211,000 acre-feet of water annually into the percolating water stratas underlying the 265,000 acres of the San Joaquin River alluvial cone between Friant Dam and Mendota Pool.⁶⁶

The boundary of the alluvial cone of the San Joaquin River is shown and designated as "Lee's Line" on Exhibit II of this brief and the City of Fresno's Municipal Water Department has a large number of wells on the San Joaquin alluvial cone which pump a large amount of San Joaquin River waters which percolate from the San Joaquin River into the underground stratas underlying the City of Fresno and thence into the wells supplying the domestic and municipal needs of the City of Fresno.

⁶⁵" * * * Rights to the use of, underground waters, whether flowing, stored or percolating, by the overlying owner or appropriator are analogous and equal to riparian rights against subsequent claimants and are part and parcel of the land and as such are real property."

Rank v. Krug, 90 F. Supp. 773 at 787 (1950).

"7. * * * an overlying owner, * * * in this state cited with approval by this Court in *Gerlach Live Stock Co. v. United States*, *supra*, has been held to have analogous rights to those of a riparian. (*Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. 663 (74 Pac. 766, 99 Am. St. Rep. 35, 64 L. R. A. 236); *Burr v. Maclay Rancho Co.*, 154 Cal. 428 (98 Pac. 260).)"

Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, 3 C. 2d 489, 525-526 (1935).

⁶⁶R. 1992, Testimony of Witness Harry Barnes, Engineer for the Bureau of Reclamation, Rep. Tr. 16,974.

6. Rights to Water After the 1928 Constitutional Amendment.

In 1928 in order to make the Central Valley Project a reality and to avoid the effect of *Herminghaus v. Southern California Edison Company*, *supra*, the people of the State of California amended the California Constitution (Art. XIV, Sec. 3, see page 31 of Appendix to this brief). Under this amendment the right of a California riparian owner was limited to that amount of water flowing past his riparian land which he could beneficially use by reasonable methods of diversion.

7. The California Doctrine of Physical Solution.

By reason of said 1928 Constitutional Amendment, California courts, in order to conserve water and to assist appropriators of water such as the United States under the Central Valley Project and to make more water available to the United States, were not only empowered, but it became their duty, to make a "physical solution" of the water rights of both riparian and appropriative owners, so that "no drop would waste uselessly into the Pacific". *People of State of California v. United States*, 235 F. 2d 647 at 662 (9th Cir.) (1956). IN OTHER WORDS, A PHYSICAL SOLUTION WAS ADOPTED BY THE CALIFORNIA COURTS NOT TO AID THOSE LIKE THE ORIGINAL PLAINTIFFS BUT TO AID APPROPRIATORS LIKE THE UNITED STATES.

*** Since the 1928 amendment of section 3 of article XIV of the Constitution, it is not only within the power, but it is the duty, of the trial court to admit evidence relating to possible physical solutions in such a case, and if none of them is satisfactory to it to suggest on its own motion

such a physical solution and to enforce the same regardless of whether the parties agree; * * *."

City of Lodi v. East Bay Municipal Utility District, 7 C. 2d 316, 318, 60 P. 2d 439 (1936).

In this discussion of the effect of the 1928 amendment we are simply summarizing the law. We agree with the Court below that the District Court's physical solution was proper and are not appealing from this part of the decision of the Court below. *State v. Rank*, 293 F. 2d 340, 344 (1950).

(a) *All Parties Requested That the District Court Make a Physical Solution.*

Before discussing what a physical solution is, it might be well to point out that as stated in our subchapter of this brief entitled "History of Litigation" (page 73 of this brief) all parties including the State of California, respondent officials of the Bureau of Reclamation, the respondent irrigation districts, the original plaintiffs, and appellant City of Fresno REQUESTED THAT THE DISTRICT COURT MAKE A PHYSICAL SOLUTION IN THIS CASE thus admitting that a physical solution was not only possible but legally proper. Even the Secretary of the Interior asked for a physical solution in this case. We quote from Secretary of Interior Douglas McKay's letter dated March 30, 1953:

"Plans for a physical solution. The State of California, as intervener, the plaintiffs, and the defendant officials of the United States have filed plans for a physical solution in Rank v. Krug. The plans filed by the State of California and the defendant officials are substantially identical and have been stated to be so by representatives of the state.

"* * *

"We recommend that you affirm the principle of this plan for a physical solution, with the understanding that in the details of its execution it will be reconciled in so far as practicable with the plan filed by the State of California, and that you so inform the Attorney General." (emphasis ours)

R. 295, Deft. Ex. A-79-A, Signed: Douglas McKay, Secretary of the Interior, Rep. Tr. 21, 975.

(b) *What is a Physical Solution.*

A physical solution has been well described by the Court below as follows:

"The matter of a physical solution becomes a practical problem which will vary with each case. That practical problem is best stated by the question — how can the utmost beneficial use be made of the waters of the particular stream without invading prior vested water rights. If those prior vested water rights can be preserved and satisfied by giving them the water to which they are entitled, and at the same time waste can be prevented by reasonable changes in natural physical characteristics, then, under the California decisions, the court may solve that problem by the use of its injunctive powers, conditioned upon making those physical changes. The parties seeking to make an appropriation or to take water, in derogation of prior vested rights, can be enjoined from taking water until those physical changes are made. The efforts of the courts of California in imposing conditional decrees of injunction requiring a physical solution have been to, as near as possible, satisfy the prior vested right whether riparian or overlying,

and at the same time make available, for appropriation and reasonable and beneficial use elsewhere, all water in excess of that required to satisfy those prior vested rights.' ” (emphasis ours)

State v. Rank, 293 F. 2d 340, 344 (1961).

- (c) *THIS COURT and Other Federal Courts Including the Court Below Have Approved the Doctrine of a Physical Solution Many Times.*

This Court in affirming the decision of the United States Court of Claims involving the uses of the water of the San Joaquin River under California's Central Valley Project approved the principle of a decree of physical solution.

“* * * If * * * one seeks to appropriate the water wasted or not put to any beneficial use, it is obligatory that he find some physical solution, at his expense, to preserve existing prior rights, * * *.”
(emphasis ours)

Gerlach Live Stock Co. v. United States, 111 Ct. Cls. 1, Aff. 330 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

By affirming this case this Court clearly approved the principle that in enforcing the water rights along the San Joaquin River under the Central Valley Project the Court should order a physical solution if possible—it being admitted by the requests of all parties herein for a physical solution, that a physical solution was possible in the present case.

The Court below in three decisions approved a physical solution in this case, viz. *State v. Rank*, 293 F. 2d 340, 344.⁶⁷ In *State of California v. United States*

⁶⁷“The California courts, confronted with the command of the 1928 Constitutional amendment, that water should not be wasted,

District Court, 213 F. 2d 818, 321 (Footnote 9) (9th Cir.) (1954)⁶⁸ and in *People of State of California v. United States*, 235 F. 2d 647 at 662 (9th Cir. 1956).⁶⁹

Moreover, the federal courts as stated, by the trial Court have long enforced decrees of physical solution involving the expenditure of money. Decrees of physical solution requiring the expenditure of money and making physical changes have been made by the federal courts, and since the approval of such a decree by the Supreme Court in *Montezuma Canal Co. v. Smithville Canal Co.*, 218 U. S. 371, 31 S. Ct. 67, 54 L. Ed. 1074

and also with the guaranties of that amendment that existing water rights be preserved to the extent of their present and prospective * * * decree which for the sake of convenience is called a 'physical solution.'

"In essence, such decree is but the conditional injunctive decree of a court of equity. Such decrees in California water rights cases are characteristic examples of the preservation by equity courts of the elements and flexibility and expansiveness so that new remedies may be invented or old ones modified in order to meet the requirements of every case and to satisfy the needs of every progressive social condition."

State v. Rank, 293 F. 2d 340, 344 (1961).

⁶⁸"9. The term 'physical solution' as used in California water law apparently contemplates a court-enforced plan for making as much water as possible available, through the construction of dams or canals or other physical or mechanical instruments, to all the lawful claimants of the waters in dispute. * * *. See: *Peabody v. City of Vallejo*, 1935, 2 Cal. 2d 351, 40 P. 2d 486, 497; *Rancho Santa Margarita v. Vail*, 1938, 11 Cal. 2d 501, 81 P. 2d 533, 562; *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* 1935, 3 Cal. 2d 489, 575, 45 P. 2d 972; *City of Lodi v. East Bay Municipal Utility District* 1936, 7 Cal. 2d 316, 341, 60 P. 2d 439, See also *Rank v. Krug*, D.C.S.C. Cal. 1950, 90 F. Supp. 773, 803."

State of California v. United States District Court, 213 F. 2d 818, 821 (Footnote 9) (9th Cir.) (1954).

⁶⁹"* * *. Perhaps some physical solution by or control under court decree could permit participation by all in the conservation of all flow of the watershed for beneficial use that no drop would waste uselessly into the Pacific."

People of State of California v. United States, 235 F. 2d 647 at 662 (9th Cir.) (1956).

(1910), the power and duty of an equity court to do so does not seem to have been questioned in the higher courts. In that case the District Court of the Territory of Arizona, in a decree determining the rights of appropriators, appointed a water commissioner, and required a physical solution by giving him the power to:

“direct the placing of proper gates, dams or other means for the control of the water of said river at the heads of the canals or other points on the banks of said canals as he may direct, at the expense of the parties hereto interested herein, and to make such rules and regulations as he may deem proper and expedient, to be observed by the parties hereto, for the distribution and use of said water.”

The Court while remanding the case for further proceeding in connection with a question of *res judicata*, nevertheless held that the decree appointing the water master with the power indicated, “did not transcend the bounds of judicial authority.” See also the Ninth Circuit case of: *Gila Valley Irrigation Dist. v. United States*, 118 F. 2d 507 (1941), and *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 F. 9 at 29 (9th Cir.) (1917).

After all, the appointment of a Watermaster by a court for the enforcement of its decrees is essentially no different than the exercise of the power of the federal courts to appoint a receiver, such as for railroads and the like.

In *State of Nebraska v. State of Wyoming*, 325 U. S. 589, 616, 65 S. Ct. 1332, 1350, 89 L. Ed. 1815 (1945), the Court said:

"There is some suggestion that if we undertake an apportionment of the waters of this interstate river, we embark upon an enterprise involving administrative functions beyond our province. * * *. But the efforts at settlement in this case have failed. A genuine controversy exists. The gravity and importance of the case are apparent. The difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution." (emphasis ours)

In the case of *United States v. Angle*, Equity No. 30, in the United States District Court for Northern California the court appointed a water master in a water suit in which the United States was one of the parties.

(d) *Examples of Physical Solution Decreed by California Courts.*

"* * * the 1928 constitutional amendment, as applied by this court in the cases cited, compels the trial court, before issuing a decree entailing such waste of water, to ascertain whether there exists a physical solution of the problem presented that will avoid the waste, * * *." (emphasis ours)

City of Lodi v. East Bay Municipal Utility District, 7 Cal. 2d 316, 339, 60 P. 2d 439 (1936).

Since the 1928 Constitutional amendment, the Supreme Court of California has required or approved conditional inductions requiring physical solutions in the following cases: *Peabody v. City of Vallejo*, 2 C. 2d 351, 40 P. 2d 486 (1935); *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 C. 2d 489,

45 P. 2d 972 (1935); *City of Lodi v. East Bay Municipal Utility District*, 7 C. 2d 316, 60 P. 2d 439 (1936); *Reclamation District No. 833 v. Quigley*, 8 C. 2d 183, 188, 64 P. 2d 399 (1937); *Hillside Water Company v. City of Los Angeles*, 10 C. 2d 677, 76 P. 2d 681 (1938); *Rancho Santa Margarita v. Vail*, 11 C. 2d 501, 81 P. 2d 533 (1938); *Meridian, Ltd. v. San Francisco*, 13 C. 2d 424, 90 P. 2d 537, 91 P. 2d 105 (1939) on petition for rehearing; *City of Pasadena v. City of Alhambra*, 33 C. 2d 908, 207 P. 2d 17 (1949); *Allen v. California Water & Telephone Co.*, 29 C. 2d 466, 176 P. 2d 8 (1946).

As stated it is not only within the power, but it is also the DUTY of the trial Court to suggest on its own motion a physical solution if none satisfactory to it has been offered by the parties. Moreover, the court possesses the power to enforce such solution regardless of whether the parties agree. *City of Lodi v. East Bay Municipal Utility District*, *supra*, 7 C. 2d 316, 60 P. 2d 439 (1936); *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, *supra*, 3 C. 2d 489, 574, 45 P. 2d 972 (1935); *Rancho Santa Margarita v. Vail*, *supra*, 11 C. 2d 501, 559, 81 P. 2d 533 (1938).

“* * *. The equity courts possess broad powers and should exercise them so as to do substantial justice, and in reference to physical solutions of the problems presented, an equity court is not bound or limited by the suggestions or offers made by the parties * * * if the trial court * * * should come to the conclusion, * * * that a substantial saving could be effected at a reasonable cost, by * * * changing some of the diversion ditches, it undoubt-

edly would have the power, * * * to make its injunctive order subject to conditions * * * keeping in mind * * * that plaintiffs have prior rights and cannot be required * * * to incur any material expense in order to accommodate defendant." (Syllabus)

Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, 3 C. 2d 489, 500-501, 45 P. 2d 972 (1935).

As part of the decree of physical solution the Court may order the subsequent appropriator *at its own cost to provide the owner of prior riparian rights with a supplemental, artificial surface supply without cost to the owner of the prior right.*⁷⁰

The Court may order that the subsequent appropriator drill new wells at the expense of the subsequent appropriator.⁷¹ The Court may order that the sub-

⁷⁰* * *. The decree should then be reframed to provide that the duty rests upon the District to maintain the levels of the plaintiff's wells above the danger level so fixed by the trial court; that in the event the levels of the wells reach the danger points, the duty be cast upon the District to *supply water to the City*, or to raise the levels of the wells above the danger mark; and if the District does not comply with this order within a reasonable time, then the injunction decree already framed, * * * shall go into effect." (emphasis ours)

City of Lodi v. East Bay Municipal Utility District, 7 C. 2d 316, 344, 60 P. 2d, 439 (1936).

⁷¹* * *. Such a decree would say to the District: You should maintain the water levels so as not to cause substantial damage to the city, and you may do this in any way best suited to your needs, or if you do not maintain those levels you should supplement the city's supply to the extent of the deficiency caused by your operations by the furnishing of water by artificial means and at your expense. If you do not do these things you are *subject to an injunction compelling releases to maintain natural conditions.*" (emphasis ours)

City of Lodi v. East Bay Municipal Utility District, 7 C. 2d 316, 345, 60 P. 2d 439 (1936).

"The District also offered, * * * in case of shortage, to supply

sequent appropriator as a part of the plan of physical solution install new pumping plants for the owner of the prior right at the cost of the subsequent appropriator.⁷² The Court may order the subsequent appropriator to build reservoirs on the subsequent appropriator's land to store winter waters and release the same to the holder of the prior right in the summer-time.⁷³ The subsequent appropriator may be required, as a part of the plan of physical solution to build a dam on the lands of the holder of a prior riparian right during the summer irrigation season.⁷⁴ The Court may order that the height of the dam on the land of the holder of a prior riparian right be raised, apparently at the expense of the subsequent appropriator.⁷⁵ That

the City of Lodi with water from its pipe-line located a few miles from the city."

City of Lodi v. East Bay Municipal Utility District, 7 C. 2d 316, 341, 60 P. 2d 439 (1936).

72" * * *. It may also be possible to install pumping plants upstream from the reservoir so as to provide drinking places for respondent's cattle."

Rancho Santa Margarita v. Vail, 11 C. 2d 501, 560, 81 P. 2d 533 (1938).

73" * * *. It may be that there are storage and reservoir sites so located on appellants' ranch, that by the diversion and storage of winter waters * * *, appellants can secure all the water they reasonably need. Perhaps by regulating the releases from such reservoirs in the summer months surface flow can be made available to respondent."

Rancho Santa Margarita v. Vail, 11 C. 2d 501, 559, 560, 81 P. 2d 533 (1938).

74" * * *. It may be that there are storage and reservoir sites so located on appellants' ranch, that by the diversion and storage of winter waters * * *, appellants can secure all the water they reasonably need. Perhaps by regulating the releases from such reservoirs in the summer months surface flow can be made available to respondent."

Rancho Santa Margarita v. Vail, 11 C. 2d 501, 559, 560, 81 P. 2d 533 (1938).

75" * * *, after referring to Lake O'Neill reservoir the court found 'that by the expenditure of reasonable sums of money the

the subsequent appropriator be required to construct a new ditch at the subsequent appropriator's expense,⁷⁶ be changed at the cost of the subsequent appropriator,⁷⁷ that the point of diversion of a canal at a damsite located upon the lands of a holder of the riparian right that the capacity of the reservoir be increased.⁷⁸ The Supreme Court of the State of California as did the District Court has also apparently cited with approval that as a part of a plan of physical solution the Court might order the *installation of five collapsible check dams to pond water so that it would percolate into the lands of the prior riparian owner—the cost of said dams to be borne by the subsequent appropriator.*⁷⁹

artificial dam at said Lake O'Neill reservoir may be increased in height * * *."

Rancho Santa Margarita v. Vail, 11 C. 2d 501, 560, 81 P. 2d 533 (1938).

76 " * * *. The equity court possesses broad powers and should exercise them * * *, if the trial court, * * *, should come to the conclusion, * * *, that a substantial saving could be effected at a reasonable cost, by * * * changing some of the diversion ditches, it undoubtedly would have the power, * * *." (Syllabus)

Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, 3 C. 2d 489, 500, 45 P. 2d 972 (1935).

77 " * * * the point of diversion of the ditch leading into said reservoir may be moved upstream and the capacity of said reservoir increased, * * *."

Rancho Santa Margarita v. Vail, 11 C. 2d 501, 560, 81 P. 2d 533 (1938).

78 " * * *, the point of diversion of the ditch leading into said reservoir may be removed upstream and the capacity of the reservoir increased, * * *."

Rancho Santa Margarita v. Vail, 11 C. 2d 501, 560, 81 P. 2d 533 (1938).

79 " * * *. The plaintiff offered to accept in lieu of the injunction claimed by it the construction by the defendants at their expense of five collapsible ponding dams * * *. It was the plaintiff's contention that these dams could be so operated as to maintain by artificial means the static head and percolation which the Mokelumne River had prior to its regulation by the defendants. The ultimate cost of this physical solution would be

The District Court in this case made the same type of order for ten collapsible check dams.

The Supreme Court of California as did the District Court in this case also has the power to order that periodic flushing flows of 2,000 second-feet be released by respondents owning an upstream dam and subsequent appropriative rights every three months to eradicate the growth of algae and remove silt from the river channel so that the water would percolate as in the state of nature just as the District Court did here and that water levels be maintained in test wells at minimum levels by the subsequent appropriator.⁸⁰

It will thus be seen that the District Court under the California decisions had the power to grant all features of the physical solution by the District Court to appellant City of Fresno and farmers on the 38-mile stretch of the river between Friant and Gravelly Ford Canal. (From the case of *City of Lodi v. East Bay Municipal Utility District*, 7 C. 2d 316, 60 P. 2d 439 (1936), it will be noted that the court could have decreed, although it did not, that in the place of check dams to percolate water from the river into the City's wells the Court could have ordered respondent officials

at least several hundreds of thousands of dollars. This offer was rejected by counsel for both defendants."

City of Lodi v. East Bay Municipal Utility District, 7 C. 2d 316, 328, 329, 60 P. 2d 439 (1936).

⁸⁰*** the court found that certain flushing releases were required to clear the channel of silt, algae and vegetation in order to keep the percolation rate as it would exist in the state of nature. *** three flushing flows of 2,000 second-feet for May 1st, July 1st and August 1st are provided. ***"

City of Lodi v. East Bay Municipal Utility District, 7 C. 2d 316, 332, 60 P. 2d 439 (1936).

to bring in water by pipe line from Friant Dam to the City without cost to the City. As shown the Supreme Court of California has therefore specifically approved every feature of the physical solution ordered by the District Court in this case. For example, the collapsible dams to pond the waters of the river for the purpose of bringing water to the pumps of the riparian farmers and causing percolation into the underground, the required releases (in cubic feet per second and acre-feet per month), the construction and raising of dams and other matters requested by the appellants and has ruled that the District Court has the reserved power to enjoin any diversion of water if the subsequent appropriator will not conform to, construct and pay for the decreed plan of physical solution of the District Court and the District Court by injunction may require such subsequent appropriator, in event he fails to carry out the plan of physical solution, even though wasteful, to release a sufficient flow of the river to maintain the rights of the prior riparian overlying owners to water without diminution (*Peabody v. City of Vallejo*, 2 C. 2d 351, 40 P. 2d 486 (1935)), at the sole expense of the subsequent appropriator as similarly prayed for by the appellant in this case and decreed by the District Court.

The physical solutions presented by the various parties to this suit and the physical solution finally adopted by the District Court appear in the subsequent subchapter of this brief entitled "History of Litigation."

D. History of Litigation.

A detailed history of the litigation in this case from the time of filing this suit in the Superior Court of Fresno County on September 25, 1947, to close of the trial in the U. S. District Court December 31, 1954 appears in *Rank v. (Krug) United States*, 142 F. Supp. 1 (1956).

The District Court in its decision decreed a plan of physical solution consisting of 10 check dams to be located between Friant Dam and Gravelly Ford Canal for ponding of the water back of the check dams to supply the riparian owners and to supply percolation into the alluvial cone of the San Joaquin River. A photograph of the type of check dam decreed by the Court, and designed by Charles H. Lee, a leading consulting engineer, and Otto Peterson, former chief construction engineer of Pacific Gas and Electric Company in California, is shown in the following picture.



Ease of Operation of Collapsible Check Dams Demonstrated to Court, 1952. Dam of Pacific Gas and Electric Co. on Feather River in California.

The physical solution was made in accordance with the decisions of this Court and the California Supreme Court.

"* * * If * * * one seeks to appropriate the water wasted or not put to any beneficial use, *it is obligatory* that he find some physical solution, at his expense, to preserve existing water rights, or if this cannot be done, and the water is to be appropriated, nonetheless, under the right of eminent domain, the riparian owners, prior appropriators and overlying landowners must be compensated for the value of the rights taken. *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 40 P. 2d 486; *City of Lodi v. East Bay Municipal Utility District*, 7 Cal. 2d 316, 60 P. 2d 439; *Hillside Water Co. v. City of Los Angeles*, 10 Cal. 2d 677, 76 P. 2d 681; *City of Los Angeles v. Aitken*, 10 Cal. App. 2d 460, 52 P. 2d 585; *Los Angeles Flood Control District v. Abbot*, 24 Cal. App. 2d 728, 76 P. 2d 188.

"It would appear that plaintiffs were not deprived of all of their rights as riparian owners by the amendment to the California Constitution. Apparently, they had the right to demand that defendant provide such a physical solution as would permit them to continue to receive so much of the waters of the San Joaquin River as they could beneficially use; or, if such a solution was impossible, that they had the right to demand of the defendant compensation for the deprivation of the right to so much of the water they had formerly received as they could beneficially use." (emphasis ours)

Gerlach Live Stock Co. v. United States, 111 Ct. Cls. 1, Aff. 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

"* * *. The decree should then be framed to provide that the duty rests upon the District to maintain the levels of the plaintiff's wells above the danger level so fixed by the trial court; that in the event the levels of the wells reach the danger points, the duty be cast upon the District to *supply water to the City*, or to raise the levels of the wells above the danger mark; and if the District does not comply with this order within a reasonable time, then the injunction decree already framed, * * * shall go into effect." (emphasis ours)

City of Lodi v. East Bay Municipal Utility District, 7 C. 2d 316, 344, 60 P. 2d 439 (1936).

The Bureau engineers estimated their plan of physical solution would take 60,000 acre-feet per year to operate and that the City's would take 70,000 acre-feet. The Bureau has actually used 626,000 acre-feet of water per year.⁸¹

The Court also gave a declaratory judgment decreeing that the City of Fresno was entitled to all the water needed for its municipal and domestic purposes before any water was transferred out of Fresno County, the county and watershed of origin of the San Joaquin River.⁸²

The United States and the defendant districts had no right to divert water at Friant which is presently

⁸¹1951-1952, 1952-1953, 1953-1954, 1954-1955, 1955-1956, 1956-1957, 1957-1958, 1958-1959, 1959-1960, U. S. Geological Survey, Water Supply Papers. Later papers not available when this brief written.

⁸²(265) Under the evidence the City of Fresno is in pressing present need of an additional supply of water for domestic and municipal purposes; it is reaching the critical point."

Rank v. (Krug) United States, 142 F. Supp. 1, 184 (1956).

needed by the City of Fresno for its domestic and municipal purposes and the City of Fresno is entitled to a declaratory judgment to that effect.

"The City of Fresno lies in a position of great natural advantage insofar as water is concerned; it is but a short distance from two rivers, the San Joaquin and the Kings, with a combined average flow of approximately 3,000,000 acre-feet. And yet, it is now in the anomalous position of being short of water to supply its inhabitants for the highest and best use, with the United States astride both rivers with gigantic dams exporting water to irrigation districts in counties and watersheds other than the San Joaquin and Kings, which water it used not as primary supply, but as a supplemental supply for irrigation and agricultural purposes, declared by California law to be secondary to the highest and best use of municipalities for domestic purposes."

Rank v. (Krug) United States, 142 F. Supp. 1, 185 (1956).

The District Court in its decision also held that any charge to the City of Fresno for this water in excess of the Class I irrigation rate (\$3.50 per acre-foot) was unreasonable and beyond the statutory authority of respondent officials to make (*Rank v. (Krug) United States*, 142 F. Supp. 1, 185 (1956).).

VI.
CITY OF FRESNO AND ITS WATER SUPPLY
DESCRIBED.

A. Population.

Appellant City of Fresno at the close of the trial in December, 1954, was a city of 107,907 population (1954 gasoline tax census).⁸³ According to the last official census of November, 1960, the population had increased to 141,600, showing its rapid growth.

The population of Fresno City has shown a continual and steady growth of 46% every ten years. Based on this percentage of growth, its estimated population in 1980, only 18 years hence, is 251,541.⁸⁴ Its estimated population by the year 2,000 is 493,020.⁸⁴ The following is Mr. Segal's (he was the City Engineer during the trial of *Rank v. Krug*) estimate of Fresno's future growth in population based on Appellant City of Fresno's Exhibit 445:

<u>"Year</u>	<u>Population</u>
1950	91,669
1960	128,337
1970	179,672
1980	251,541
1990	352,157
2000	493,020
2010	690,228
2020	966,319"

Fresno is the capital of Fresno County, the "county of origin of waters of the San Joaquin River".⁸⁵ In

⁸³Rep. Tr. 23,363.

⁸⁴R. 2324, Pltf. Ex. 445, 23,678.

⁸⁵"* * * The San Joaquin River is a natural watercourse arising in the Sierra-Nevada in Fresno and Madera Counties." *Meridian, Ltd. v. San Francisco*, 13 C. 2d 424, 429, 90 P. 2d 537, 91 P. 2d 105 (1939).

other words, Fresno is located in both the county of origin and watershed of the San Joaquin River.

Fresno is located in the County of Fresno, the largest producer of agricultural crops of any county in the world.⁸⁶

The total value of agricultural crops produced in Fresno County in 1951 was \$325,579,150.00⁸⁷ and at the close of 1961 Fresno County was still the largest producer of agricultural crops in the world. For the year ending December, 1961, the total value of Fresno County's agricultural crops was \$385,381,340.00.⁸⁸

Fresno lies less than 3 miles from the San Joaquin River and less than 7 miles from Friant Dam and is therefore in an area "immediately adjacent to the Central Valley Project" as used by the acts of Congress heretofore cited and therefore is entitled to purchase municipal water from the Central Valley Project under the April 16, 1906, 34 Stat. 116⁸⁹ amendments to the reclamation law as well as under the Act of August 26, 1937, 50 Stat. 844, and the Act of August 4, 1939, 53 Stat. 1187, and other Acts of Congress reauthorizing the Central Valley Project.

The City of Fresno is also partially located within the alluvial cone of the San Joaquin River.⁹⁰ That part of the City of Fresno lying on the alluvial cone of the San Joaquin is supplied in whole or in part by percolation from the San Joaquin River.⁹¹ The Dis-

⁸⁶R. 347 (New Volume), Pltf. Ex. 210, 15,497.

⁸⁷R. 347 (New Volume), Pltf. Ex. 210, 15,497.

⁸⁸1961 Agricultural Crop Report, Fresno County.

⁸⁹Act of April 16, 1906, 34 Stat. 116, 117.

⁹⁰Exhibit II of this brief.

⁹¹"Q. And you consider the percolation, the present percolation from the San Joaquin River and from time immemorial, a

trict Court found this to be the fact,⁹² and the court below sustained the District Court in this finding.

Over 75% of the alluvial cone of the San Joaquin River is located in Fresno County (see Exhibit II of this brief). Therefore 75% of the 200,000 acres which the District Judge found would be seriously damaged and 75% of the 100,000 acres, or 75,000 acres of the land the District Judge found would have its underground water destroyed if respondents' plan of physical solution is put into operation and not the physical solution of the District Judge. [See R. 783, Find. 26.] This land as just shown comprises the finest and the highest producing agricultural land in the United States.

B. The Water Supply of the City of Fresno.

The water supply of the 107,907 population of the City of Fresno at the close of the trial in the District Court in December, 1954, came from the city's wholly owned municipal water system, acquired in the year 1931, and which at the trial of this action was valued at \$5,181,368.00 in 1954.⁹³ Due in considerable measure to expenses caused by the city's rapidly falling water table and new installations the value of Fresno's municipal water system as of June 30, 1962, had risen to 10,870,129.⁹⁴ It was purchased under the representations by state officials that its water filings on the

major source of supply to the wells within the boundaries of the City of Fresno and lying within the alluvial cone of the San Joaquin River?

The Witness: Yes, it is one of the sources of supply of that area, and one of the major sources."

R. 1409. Testimony of Charles H. Lee, Rep. Tr. 1480.

⁹²R. 769, 770, Finding 21.

⁹³R. 355 (New Volume) Pltf. Ex. 420, 23,444.

⁹⁴June 30, 1962, Report of Fresno City Water Department.

San Joaquin River would be honored as having first priority and that Fresno would have a supplement surface water supply for the San Joaquin River.

The Fresno City Municipal Water Department pumps its entire water supply from the underground percolating waters underlying the City of Fresno, part of which as stated lies on the alluvial cone of the San Joaquin River (see "Lee's Line," Exhibit II this brief). The wells on the alluvial cone of the San Joaquin River were in large measure supplied by water which formerly percolated from the San Joaquin River prior to Friant dam.⁹⁵

C. The Respondent Bureau of Reclamation Officials Admit That the Underground Water Supply of the City of Fresno Is Limited to 30,000 Acre-Feet per Year.

The percolating underground supply, on which the City of Fresno is wholly dependent, had a reliable supply of only 30,000 acre-feet per annum according to respondents' own witness,⁹⁶ in 1952.

D. The City of Fresno Is Badly Overpumping the Fast Diminishing Supply of Its Wells.

The wells of the City of Fresno in 1954, the last year of the trial before the District Court, pumped ap-

⁹⁵"The Witness: Yes, it is one of the sources of supply of that area, and one of the major sources."

R. 1409, Testimony of Charles H. Lee, Rep. Tr. 1480.

⁹⁶"By Mr. Rowe: Q. Mr. Hill, then at the present time, from your own figures, if they are pumping 43,000 acre-feet, in the City of Fresno now, and in the next 50 years, you would only suggest pumping 30,000 acre-feet, are they not overpumping in the City of Fresno 15,000 acre-feet now? A. They are definitely overpumping.

Q. Is that the amount, 15,000 acre-feet?

The Court: It is all above 30,000?

The Witness: Yes."

Testimony of Leland Hill, Rep. Tr. 15,615.

proximately 43,000 acre-feet of water annually, or 13,000 acre-feet more than a safe yield of the wells. In the year ending 1959, the city's wells pumped 60,700 acre-feet⁹⁷ or an increase of 17,000 acre-feet during the five year period⁹⁸ since the close of the trial in the District Court and 30,000 acre-feet more than the safe yield of its wells according to the respondent officials' own engineers.

E. The City of Fresno Needs a Supplemental Surface Water Supply of at Least 100,000 Acre-Feet Annually.

The respondent Bureau of Reclamation officials' witnesses, admitted the overpumping by the City and that the city in 1954 needed AN EVENTUAL SUPPLEMENTAL SURFACE SUPPLY OF 100,000 ACRE-FEET PER YEAR.⁹⁹ The City engineer's estimate is 50% higher but in fairness we use the estimates of respondents' engineers.

Mr. Irving Ingerson, Chief Hydraulic Engineer of the State of California, placed on the stand by the State of California, testified that only one-third of the Fresno City water supply in the future (i.e. after the close of the trial in the District Court in 1954) could be pumped from the underground and that the city as early as 1952 was in need of an immediate supplemental surface water supply for the other two-thirds of its municipal water supply.⁹⁹

⁹⁷1959 Fresno City Water Department Report.

⁹⁸"The Court: He didn't say that. He said they could safely have a supply underground of 30,000 and would need another 100,000 acre-feet.

By Mr. Rowe: Q. * * * needs another 100,000 acre-feet from another source? A. That is *correct*."

R. 1983, Testimony of Leland Hill, Rep. Tr. 15,613, 15,614.

⁹⁹"* * * we have to think of the future and the growth of the

F. The Respondents' Bureau of Reclamation Engineers Admit the Bureau Had at Least 50,000 Acre-Feet of Water in Friant Available to the City.

Moreover, the Chief Water Rights Engineer of the United States Bureau of Reclamation, Leland Hill, during the trial before the District Court then went on to testify THAT THE BUREAU OF RECLAMATION HAD AVAILABLE AT FRIANT FOR THE CITY OF FRESNO, 50,000 ACRE-FEET OF CLASS I IRRIGATION WATER WHICH THEY DID NOT NEED AND COULD SUPPLY THE CITY OF FRESNO WITH THIS WATER WITHOUT INFRINGING ON THE WATER SUPPLY OF ANY RESPONDENT DISTRICT "that we now have contracts with *or contemplate* contracts with". The actual amount available was later found to be nearly 96,000 acre-feet due to the fact the Friant-Kern Canal did not seep as much as expected. This was strictly Class I Irrigation water.

"THE WITNESS: Your Honor, the operation studies that have been made * * * and as they were originally presented to the various irrigation districts included Class I water in an amount of 800,000 acre-feet and the United States can contract Class I water up to that quantity without infringing upon the water supply from the project to the various districts that we now have contracts with *or contemplate contracting with*. There is approximately 50,000 acre-feet of water that could be made available.

city, and my thought is at least two-thirds of the total requirements that the city could anticipate in the future should be derived from outside."

R. 1896, Testimony of Irvin M. Ingerson, Rep. Tr. 12,788, 12,789.

"THE COURT: Where?

"* * *

"THE WITNESS: In Millerton Lake, your Honor."

Testimony of Leland Hill, Rep. Tr. 15,611.

This desperate situation¹⁰⁰ of the future water supply of the City of Fresno is also shown by the following chart prepared by Fresno City Engineer, Segel, and introduced at the trial showing the consistent growth, estimated future population of the *metropolitan area* served by the Fresno City Municipal Water Department, and estimated future water requirements of the City of Fresno Water Department:

"40% INCREASE			
"Year	Population	Water Consumption	
1950	106,592	41,574	acre-feet
			per year
1960	149,229	56,670	" ¹⁰⁰
1970	208,921	79,338	"
1980	292,489	111,073	"
1990	409,484	155,501	"
2000	573,278	217,702	"
2010	802,589	304,783	"
2020	1,123,625	426,696	"

NOTE: The population increase since 1900 has been 46% each 10 years.¹⁰¹

As stated the city pumped 60,700 acre-feet in 1959 or nearly 3,000 more acre-feet than Segel estimated would be needed a year earlier in 1960 showing that his estimates for future use by the City of Fresno was on the conservative side.

¹⁰⁰The actual pumping for 1959, one year earlier, was 60,700 acre-feet.

¹⁰¹R. 2323, Pltf. Ex. 444, 23,674.

The chart now herein inserted (Exhibit V, see page opposite) shows a continual drop in the water levels of the city wells since 1942.

The water level map prepared by the State of California showing drops in excess of more than 35 feet in the water level of certain City of Fresno wells in the first four years of operation of Friant Dam appears on Pltf. Ex. 188, Cal. Ex. DD, R. 2349, 10,781. WHICH WE RESPECTFULLY ASK THIS COURT TO EXAMINE.

As stated, the District Judge found water levels in the alluvial cone of the San Joaquin River had dropped in some places over 100 feet in the five-year period since the start of operation of Friant Dam. [R. 784, Finding 26.]

The City of Fresno has no place to go for a supplemental water supply except from the Central Valley Project. In 1956 the District Judge found that the city's water supply had reached the critical point.

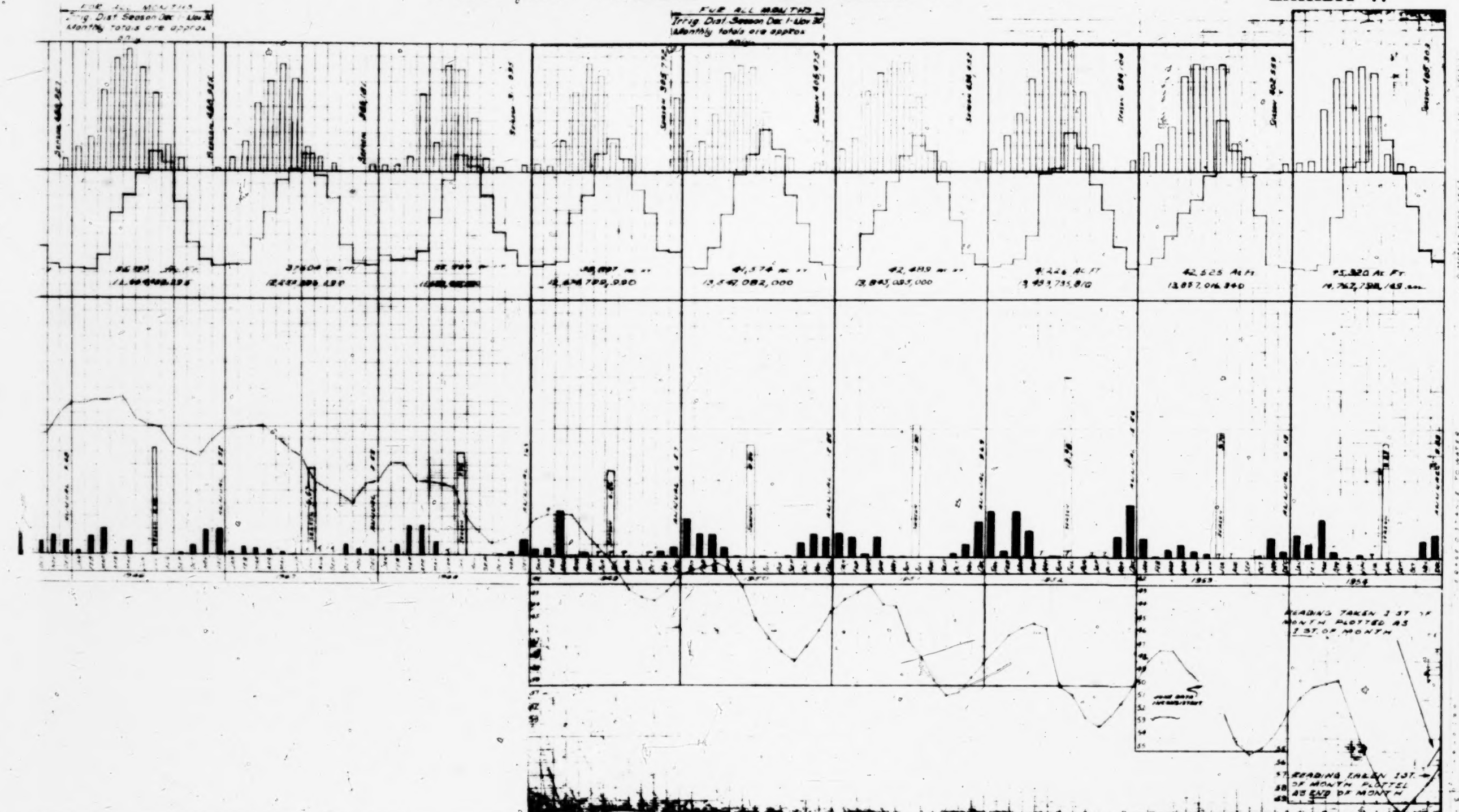
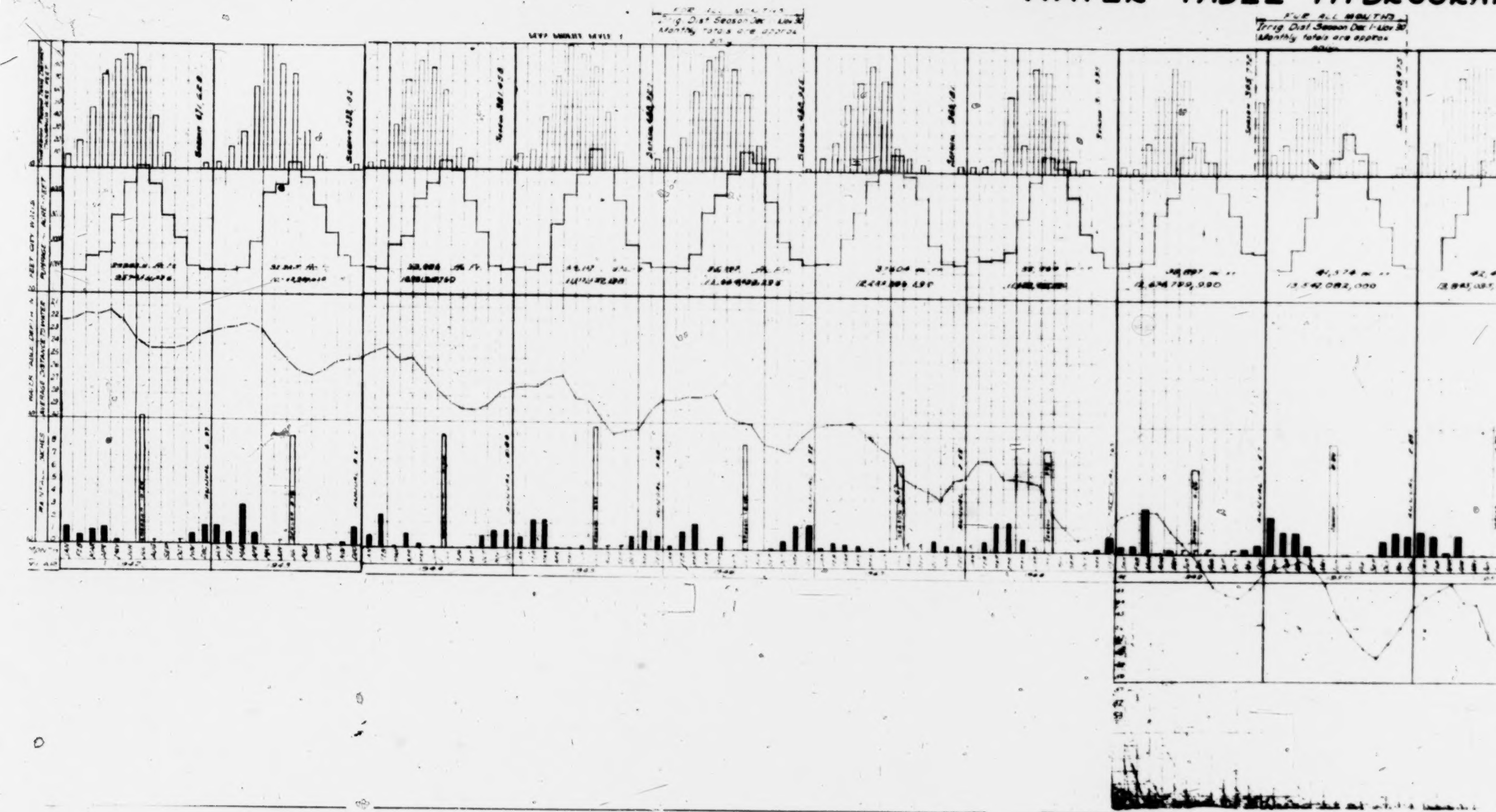
G. The City of Fresno Is in the Service Area of the Central Valley Project.

We have heretofore shown in the foregoing subchapter of this brief entitled "Legislative History of the Central Valley Project" that beginning with the approval by the people of California in 1933 one of the primary purposes of Friant Dam was to provide water for domestic and municipal use, that when the Central Valley Project was approved by President Roosevelt in the Feasibility Report of 1935, domestic and municipal uses were approved as primary uses of the project and that when Congress authorized and reauthorized the Central Valley Project, the Central

WATER TABLE HYDROGRAPH

WATER TABLE HYDROGRAPH

EXHIBIT V.



Valley Project was authorized and reauthorized for domestic (Act of August 26, 1937, 50 Stat. 844) and municipal uses (Act of August 4, 1939, 53 Stat. 1187.) To the same effect is the ruling of this Court¹⁰² and other acts. In closing our discussion of the service area of the Central Valley Project we call the court's attention to the map on the page following (Exhibit VI¹⁰³ of this brief) and this statement of part of the decision of the California Water Rights Board:

"Both the City of Fresno and the Fresno Irrigation District are, and always have been, since the formulation of general plans for the Central Valley Project, fairly within the service area of the Central Valley Project."

State of California, State Water Rights Board,
Decision No. D-935, adopted June 2, 1959,
p. 68.

¹⁰²32. Prior to December 2, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land nonriparian to the river, situated both to the north and south of Friant in the counties of Madera, Merced, Fresno, Tulare, Kings, and Kern in the State of California." (emphasis ours)

Gerlach Live Stock Co. v. United States, 111 C. Cls. 1, 24, Aff. 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

"* * *. The object of the plan is to arrest this flow and regulate its seasonal and year-to-year variations, thereby creating salinity control to avoid the gradual encroachment of ocean water, providing an adequate supply of water for municipal and irrigation purposes, facilitating navigation, and generating power." (emphasis ours)

Ivanhoe Irrigation District v. McCracken, 357 U. S. 275, 281, 78 S. Ct. 1174, 1179, 2 L. Ed. 2d 1313 (1958).

¹⁰³"The Central Valley basin development * * * includes * * * water * * * for municipal and miscellaneous purposes including cities * * *." (emphasis ours)

United States v. Gerlach Live Stock Co., 339 U. S. 725, 733, 70 S. Ct. 955, 959, 94 L. Ed. 1231 (1950).

Due to Boke's refusal to negotiate for municipal water, his illegal granting of water to irrigate 339,000 acres of non-cultivated lands in violation of the Feasibility Report and acts of Congress, and his exorbitant municipal charges, with the exception of Fresno, only a few feet of municipal water out of Friant Dam was ever contracted for to the small towns of Friant and Orange Cove.¹⁰⁴

As has heretofore been shown and will be shown in the following chapter of this brief entitled "argument" due to the domestic and municipal priority of Appellant City, due to the fact the City of Fresno is in the county and watershed of origin, due to the fact it is in the service area of the Central Valley Project and due to the fact that it is desperately in need of water with no other place to get it except from the Central Valley Project it is submitted that the City is entitled to at least a total of 100,000 acre-feet (40,000 in addition to its present contract) of this irrigation water and that the price for the entire 100,000 acre-feet be reduced to \$3.50 per acre-foot. These points will be more fully discussed in the following chapter of this brief entitled "Argument".

H. The Percolating Water Rights of the City of Fresno.

As heretofore shown, a large number of the wells of the City of Fresno's municipal water department are located in the alluvial cone of the San Joaquin River and are supplied from percolation from the San Joaquin River. These percolating rights of the City are

¹⁰⁴Bulletin No. 2, "Feasibility of State Ownership and Operation of the Central Valley Project of California," Water Project Authority of the State of California, Earl Warren, Governor, March, 1952.

EXHIBIT VI.

WATER PROJECT AUTHORITY
OF THE
STATE OF CALIFORNIA

CENTRAL VALLEY PROJECT OF CALIFORNIA

Scale of Miles

1952

LEGEND

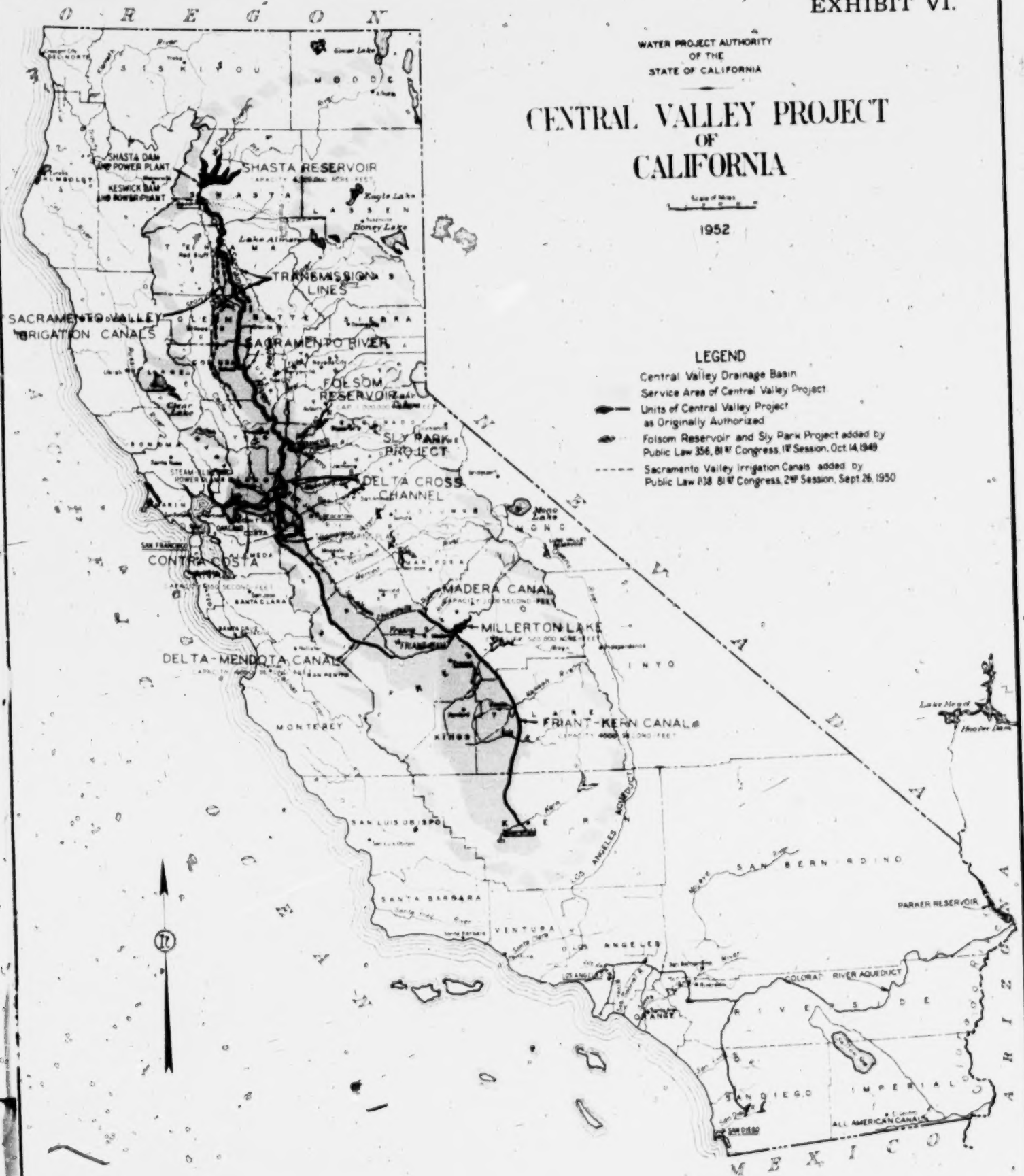
Central Valley Drainage Basin

Service Area of Central Valley Project

Units of Central Valley Project
as Originally Authorized

Folsom Reservoir and Sly Park Project added by
Public Law 356, 81st Congress, 1st Session, Oct. 14, 1949

Sacramento Valley Irrigation Canals added by
Public Law 438, 81st Congress, 2nd Session, Sept. 26, 1950



the same as or analogous to a riparian right. (*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 C. 2d 489, 45 P. 2d 972 (1935).) The District Court found that these wells on the alluvial cone would be seriously damaged if the Bureau's plan of physical solution was adopted and the flow of the San Joaquin cut to 60,000 acre-feet annually as threatened by Boke. The City's right to this underground water due to its domestic priority and location in the county and watershed of origin will be discussed under the following chapter of this brief entitled "Argument".

VII.

SUMMARY OF ARGUMENT.

In accordance with Rule 40(f) of this Court the following summary of argument is here set forth:

1. The determination of the limits of the statutory authority of an administrative official is a judicial and not an administrative determination.

2. The determination of whether charges for water to the appellant City of Fresno from the Central Valley Project are reasonable or unreasonable arbitrary and illegal, is a judicial and not an administrative determination.

3. That an action to determine whether rates for water charged to the City of Fresno by the respondent officials out of the Central Valley Project are reasonable or unreasonable, illegal or arbitrary, is not a suit against the United States, and the United States is not an indispensable party to such an action.

4. That in view of the fact there was no designation of error in respondents' record on appeal in the Court below nor in any of respondents' petitions for

certiorari under Rule 23(c) of this Court the decision of the District Court that any charge for Central Valley Project water in excess of the charge for Class-I irrigation water (\$3.50 per acre-foot) was unreasonable, must stand if this determination of this matter of unreasonableness and illegality is a judicial determination.

5. That respondent officials are not authorized to add a profit in rates charged for water to the City of Fresno out of the Central Valley Project in addition to a proportionate charge for construction costs and operation and maintenance charges allocable to municipal water together with interest thereon at a rate not to exceed $3\frac{1}{2}$ per cent as provided for in the Basic Reclamation Act of June 17, 1902, 32 Stat. 388; the Municipal Water Act of April 16, 1906, 34 Stat. 116-117; the Central Valley Act of August 26, 1937, 50 Stat. 844, 850; and the Act of August 4, 1939, 53 Stat. 1187, 1194, and the *Act of July 2, 1956*, 70 Stat. 433.

6. That Congress never authorized the taking of the riparian and overlying rights of the farmers between Friant Dam and Gravelly Ford Canal, nor the overlying percolating water rights of the City of Fresno supplied by seepage from the San Joaquin River and that by reason of this lack of statutory authority respondent officials cannot take said rights by eminent domain or by condemnation. This is true because of the laws of the State of California giving domestic and municipal water priority and requiring water to be reserved to the watershed and counties of origin before being exported elsewhere and because the Basic Reclamation Act of June 17, 1902, 32 Stat. 388, and the *Act of July 2, 1956*, 70 Stat. 480, 484, reau-

thorizing the Central Valley Project specifically required the respondents to construct and operate the Central Valley Project in accordance with California water laws and because the Act of Congress of October 14, 1949, 63 Stat. 852, 853, specifically required respondents to carry out California county of origin and watershed of origin laws in the construction and operation of the Central Valley Project.

7. That the United States has waived its immunity to suit under the Act of July 10, 1952, 66 Stat. 516, 560, and other Acts and by its conduct in voluntarily becoming a party in the decision of the California Water Rights Board which has become final and which provided that said decision should be subject to the final decision in this case.

8. That the fact that a few of the named plaintiffs in the class action part of this suit had infinitesimal prescriptive and appropriative rights to water of the San Joaquin River as well as riparian rights, as did the class they represent, did not justify a reversal of the District Court and prevent the waiver of immunity of the United States since the error, if any, was so inconsequential and immaterial as not to justify a reversal.

9. That the City of Fresno is in the service area of the Central Valley Project and is entitled to have its municipal water needs supplied at least up to a minimum amount of at least 100,000 acre-feet, which amount the Bureau of Reclamation engineers testified was the minimum amount the City requires.

10. That the decision of the District Court that any charge for water to the City of Fresno in excess of the Class I irrigation water rate (\$3.50 per acre

foot) was unreasonable, arbitrary and in excess of the statutory authority of respondent Bureau officers must stand since no objection was raised in respondent's points on appeal or in their petition for certiorari this being a judicial decision.

11. That the lower Court erred in relieving the respondent irrigation districts from the operation of the injunctive decree of the lower Court although correctly retaining them as parties since they with two exceptions voluntarily entered the suit, since all districts joined in asking the affirmative relief of a physical solution and since this Court has held that these irrigation districts taking water from a reclamation project, not the government, are the real owners of the water of the project subject, of course, to the prior vested rights of the owners along the stream, original plaintiffs.

12. That the plan of physical solution approved both by the District Court and the court below should be affirmed in accordance with the principles approved by this Court.¹⁰⁵ It is best for all parties as it will pos-

¹⁰⁵ " * * * If * * * one seeks to appropriate the water wasted or not put to any beneficial use, it is obligatory that he find some physical solution, at his expense, to preserve existing prior rights * * * "

"It would appear that plaintiffs were not deprived of all of their rights as riparian owners by the amendment to the California Constitution. Apparently, they had the right to demand that defendant provide such a physical solution as would permit them to continue to receive so much of the waters of San Joaquin River as they could beneficially use; or, if such a solution was impossible, that they had the right to demand of the defendant compensation for the deprivation of the right to so much of the water they had formerly received as they could beneficially use." (emphasis ours)

Gerlach Live Stock Co. v. United States, 111 Ct. Cls.,
1 at 81, Aff. 335 U. S. 725, 70 S. Ct. 955, 94 L. Ed.
1231 (1950).

sibly save the government over \$100,000,000 in damages in eminent domain if this court should find respondent officials can take the riparian and overlying percolating water rights of the farmers between Friant Dam and Gravelly Ford Canal, will supply the riparian rights of the original plaintiffs and of the Appellant City of Fresno and will provide sufficient water so that probably the contracts of all Respondent Districts can be fulfilled as well as providing at least 100,000 acre-feet of class I surface irrigation water for the City of Fresno, said amount the engineers for Respondent Bureau of Reclamation officials found the City of Fresno needs.

13. That the decision of the District Court should be affirmed in its entirety and the Court below reversed on all matters in which the Court below reversed the District Court.

14. That the respondent officials are not entitled to make a profit from sales of waters to municipalities but are only entitled to the return of an equitable allocation of construction and costs of operation and maintenance with interest in the Secretary's discretion, not to exceed $3\frac{1}{2}\%$.

VIII.
ARGUMENT.

A. The Determination of the Limits of Statutory Authority of an Administrative Official Under Acts of Congress Such as Those Authorizing the Central Valley Project Is a Judicial and Not an Administrative Decision as Erroneously Held by the Court Below.

That the determination of the limits of the powers of an administrative official such as are the respondent Bureau of Reclamation officials under the acts of Congress governing reclamation projects in general, and the Central Valley Project in particular, is a judicial and not an administrative determination is, we submit, too clear for argument.¹⁰⁶

¹⁰⁶ * * * The responsibility of determining limits of statutory authority of administrative agencies is a judicial function * * *." (Syllabus.)

Stark v. Wickard, 321 U. S. 288, 310, 64 S. Ct. 559, 571, 88 L. Ed. 773 (1944).

"This suit alleges that the Secretary of Agriculture is disobeying a congressional mandate. Such allegation gives this court jurisdiction and the suit is not one against the United States * * *"

"(2) In this case the Secretary has disobeyed the congressional mandate."

Publicker Industries v. Anderson, 68 F. Supp. 532, 533 (1946).

"* * * where he (the head of a department) is directed by law to do a certain act affecting the absolute rights of any individuals, * * * the performance of which the President cannot lawfully forbid, * * * it is not perceived on what ground the courts of the Country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department." (emphasis ours)

Marbury v. Madison, 5 U. S. 137, 170, 2 L. Ed. 60 (1803).

"The president (of the United States) cannot authorize a Secretary of State to omit the performance of those duties which are enjoined by law." (Syllabus; emphasis ours.)

Marbury v. Madison, 5 U. S. 137, 2 L. Ed. 60 (1803).

"* * *. But public officials may become tort-feasors by ex-

- B. The Decision of the Court Below That the Determination of Whether Charges for Water to the City of Fresno by the Respondent Bureau of Reclamation Officials Were Reasonable or Unreasonable, Arbitrary, Illegal and Capricious and Whether Such Rate Was in Excess of the Statutory Authority Granted Respondent Officials by Congress Was an Administrative Decision and Not a Judicial Decision Is in Error and Should Be Reversed by This Court.

The Court below held that the determination of whether a water rate under a Bureau of Reclamation Project was reasonable or unreasonable, arbitrary, capricious or illegal was strictly an administrative and not a judicial determination. We quote from the decision of the Court below:

“* * *. It is their administrative function to determine the rates at which water shall be delivered. It cannot be said that their statutory authority is limited to the making of such determinations as the courts may find to be reasonable.”

State of California, United States of America v. Rank, 293 F. 2d 340, 352 (1961).

We submit that the Court below is in error in its above decision and should be reversed.

Unreasonable has been defined as meaning “arbitrary”: *Wisconsin Telephone Co. v. Public Service Commission*, 287 N. W. 122, 232 Wis. 274 (1939):

ceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment.” (emphasis ours)

Land v. Dollar, 330 U. S. 731, 738, 67 S. Ct. 1009, 1012, 91 L. Ed. 1209 (1946).

Harris v. State Corporation Commission, 46 N. M. 352, 129 P. 2d 323 (1942); *State v. Public Service Commission*, 179 S. W. 2d 132, 238 Mo. 317 (1944); "capricious": *Wisconsin Telephone Co. v. Public Service Commission*, 287 N. W. 122, 232 Wis. 274 (1939); *Harris v. State Corporation Commission*, *supra*; "illegal": *City of Louisville v. Koenig*, 162 S. W. 2d 19, 290 Ky. 562 (1942); "without support in evidence": *Application of Chicago B. & O. R. Co.*, 295 N. W. 389, 138 Neb. 767 (1940); "confiscatory": *Lone Star Gas Co. v. State*, 153 S. W. 2d 681, 137 Tex. 279 (1941); and "irrational": *Harris v. State Corporation Commission*, 46 N. M. 352, 129 P. 2d 323 (1942).

It is for the courts to determine whether a water rate is reasonable or unreasonable, arbitrary, capricious or illegal. This is a judicial not an administrative function.

Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143 (1912);

Yuma County Water Users' Ass'n v. Schlecht, 262 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909 (1922);

Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 F. 72 (8th Cir.) (1914).

"12. The public have a right to be exempt from unreasonable exactions * * *." (Syllabus)

Smyth v. Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819 (1898).

"The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable * * *. But that involves an inquiry as to what is reasonable and just for the public. * * *."

The public cannot properly be subjected to unreasonable rates * * *."

Covington & L. Turnpike Co. v. Sanford, 164 U. S. 578, 17 S. Ct. 198, 41 L. Ed. 560, 566 (1896).

Stark v. Wickard, 321 U. S. 288, 64 S. Ct. 559, 88 L. Ed. 733 (1944) (enjoining Secretary of Agriculture from enforcing unreasonable minimum milk prices set by him).

"* * * when a case arises in which it becomes necessary to determine whether a properly established rate is a reasonable or constitutional one, either to protect the public against excessive or unreasonable charges, or its constitutional rights * * *, the courts may determine the reasonableness of such rate and may enjoin the enforcement of an unjust, unreasonable, rate." (emphasis ours)

43 Am. Jur. 693, 694.

It is submitted that as was stated by this Court there is no place in the American constitutional system for the exercise of such arbitrary power by the respondent Bureau of Reclamation officials as occurred here.

"In our view, this case resolves itself into a question of the power of the Secretary of the Interior * * *. But as has been affirmed by this court in former decisions there is no place in our constitutional system for the exercise of arbitrary power, and, if the Secretary has exceeded the authority conferred upon him by law then there is power in the court to resolve the status of the parties aggrieved by such unwarranted action." (emphasis ours)

Garfield v. United States, ex. rel. Goldsby, 211 U. S. 249, 262, 29 S. Ct. 62, 66, 53 L. Ed. 168, 174 (1908).

"Arbitrary power and the rule of the constitution cannot both exist."

Jones v. Securities and Exchange Commission, 298 U. S. 1, 24, 56 S. Ct. 654, 661, 80 L. Ed. 1015 (1936).

It is further submitted that the mere fact that the record title to the reclamation works is in the government or even if we assume that the title to the water is in the government and not in the respondent districts which it is not, the jurisdiction of this Court would not thereby be defeated as stated by this Court:

"1. The fact that the legal title to allotable Indian lands is still in the government does not defeat the jurisdiction of a court over a suit to compel the Secretary of the Interior to undo, as wholly unwarranted and unauthorized by law his action in summarily erasing from the approved rolls of citizenship in the Choctaw and Chickashaw Nations the name of one who has received an allotment certificate and is in the possession of the land." (Syllabus)

Garfield v. United States, ex rel. Goldsby, 211 U. S. 249, 262, 29 S. Ct. 62, 66, 53 L. Ed. 168, 174 (1908).

However, title to the water in the Central Valley Project is not in the government but in the landowner subject to prior rights of original plaintiffs.

"* * * that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall

be the basis, the measure, and the limit of the right."

Act of June 17, 1902, 32 Stat. 388, 390, 43 U. S. C. Sec. 391.

Congress in its legislation regarding the Central Valley Project again reaffirmed the above provision and provided that the water from a reclamation project is appurtenant to the land and therefore owned by those landowners being served from the project.

"* * *. That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."

Act of July 2, 1956, 70 Stat. 483, 484.

Moreover, this is the holding of this Court.

"Section 8 of the Reclamation Act of June 17, 1902, 43 U. S. C. A. 372-382, provided: * * * that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated. * * *. We can say here what was said in *Ickes v. Fox*, *supra*, 300 U. S. pages 94 and 95, 57 S. Ct. page 416, 81 L. Ed. 525: 'although the government diverted, stored and distributed the water the contention of petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made *not* for the use of the government but under the Reclamation Act for the use of the landowners, and by the terms of the law and of the contract already referred to *became the property of the landowners* wholly distinct from

the property-right of the government in the irrigation works. Compare *Murphy v. Kerr*, (D. C.) 296 F. 536, 544, 545. The government was and remained simply a carrier and distributor of the water (*Id.*) with the right to receive the sums stipulated in the contract as reimbursement * * *.⁹ (emphasis ours)

* *State of Nebraska v. State of Wyoming*, 325 U. S. 589, 613-614, 65 S. Ct. 1332, 1349, 89 L. Ed. 1815 (1945);

Ickes v. Fox, 300 U. S. 82, 95, 57 S. Ct. 412, 416, 81 L. Ed. 525 (1937).

C. An Action to Determine Whether Water Rates Charged by the Bureau of Reclamation Are Reasonable or Unreasonable, Illegal or Arbitrary, Is Not a Suit Against the United States.

The Court below ruled as follows:

“* * *. It is their administrative function to determine the rates at which water shall be delivered. It cannot be said that their statutory authority is limited to the making of such determinations as the courts may find to be reasonable. The complaint of Fresno in this regard is a complaint against the United States * * *.”

State v. Rank, 293 F. 2d 340, 352 (1961).

It is submitted that this part of the decision of the Court below is in error since under the decisions of this Court an action to determine whether water rates charged by the Bureau of Reclamation are reasonable or unreasonable, illegal or arbitrary, is not a suit against the United States.

Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143 (1912);

Yuma County Water Users' Ass'n v. Schlecht,
262 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909
(1922);

United States v. Lee, 106 U. S. 196, 1 S. Ct.
240, 27 L. Ed. 171 (1882);

Philadelphia Co. v. Stimson, 223 U. S. 605, 32
S. Ct. 340, 56 L. Ed. 570 (1911);

Shaughnessy v. Pedreiro, 349 U. S. 48, 75 S.
Ct. 591, 99 L. Ed. 868 (1955);

Work v. Louisiana, 269 U. S. 250, 46 S. Ct. 92,
70 L. Ed. 259 (1925);

“* * *. The questions whether or not the *charges* alleged to be *illegal* and the acts and threatened acts of executive officers depriving the shareholders of a water users' association of water * * * are justified by law, are questions of law which a court of equity is empowered to determine in a suit of such an association against such executive officers, although the Secretary of the Interior or other executive officers have already decided them.

“3. United States — ‘Suit Against United States’ Interference With Rights.

“A suit against executive officers of the United States to enjoin them from committing acts unauthorized by or in violation of law, to the irreparable injury of the property rights of the plaintiff, is not a ‘suit against the United States’, nor is it or the injunction sought objectionable, either on the ground that they interfere with the property or the possession of the property of the United States, * * *.” (emphasis ours)

Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 F. 72, 73 (8th Cir.) (1914).

Swigart v. Baker, supra, was a suit for an injunction by a member of an irrigation district which was supplied with water from the Sunnyside unit of the Yakima Irrigation Bureau of Reclamation Project in eastern Washington, against the local officials of the United States Bureau of Reclamation in regard to the reasonableness and legality of certain rates for water the Secretary of the Interior was charging. Neither the Secretary of the Interior nor the United States was a party. The District Court of eastern Washington ruled that this suit was not one against the United States. We quote:

"(2) The respondents claim that this is, in effect, a suit against the government. If the position taken by the complainant is sound, and the respondents, without authority of law, are attempting to deprive him of rights accorded to him by the law, the claim that this is a suit against the government is utterly unfounded."

Baker v. Swigart, 196 F. 569, 571 (1912).

This Court affirmed this judgment of the District Court in the above-entitled case, we quote:

"The decree of the Circuit Court of Appeals is reversed, that of the District Court is affirmed, and the case remanded to the District Court."

Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 648, 57 L. Ed. 1143 (1912).

Yuma County Water Users' Ass'n v. Schlecht, supra, was a suit for an injunction by owners of tracts of land in the Bureau of Reclamation's Yuma Irrigation Project against "local officials of the Yuma Project of the United States Reclamation Service" (*Yuma County Water Users' Ass'n v. Schlecht*, 275 F. 885

(9th Cir.) (1921), to determine the legality and reasonableness of water rates under the project. The United States was not a party.

1. Overruling the Decision of the Lower Court and Affirming the Decision of the District Court Cannot Possibly Cost the United States Money and May Increase Its Income From the Central Valley Project.

In the first place it can be pointed out that if the higher rate of \$10.00 per acre-foot (not for municipal water, but only for Class I *irrigation* water) was illegal and unreasonable as found by the District Court and that \$3.50 per acre-foot (not for municipal water with municipal priority but strictly irrigation water) was the legal charge as found by the District Court for this water then, since the government is only entitled to the legal charge if they received the legal charge to which they are entitled, and not the higher illegal charge to which they are not entitled, they could not possibly deplete the treasury.

Moreover, as heretofore shown, the Bureau only admitted that they would only give Class I *irrigation* water to the City of Fresno if forced to give any water to the City by court order.¹⁰⁷ They did not

¹⁰⁷"The Witness: Your Honor, the operation studies that have been made . . . and as they were originally presented to the various irrigation districts included *Class I water* in an amount of 800,000 acre-feet and the United States can contract Class I water up to that quantity *without intringing* upon the water supply from the project to the various districts that we now have contracts with or contemplated contracting with. There is approximately 50,000 acre-feet of water that could be made available. (To Fresno.)

"The Court: Where?

"The Witness: In Millerton Lake, your Honor." (emphasis ours)

R. 1983, Testimony of Leland K. Hill, Rep. Tr. 15-1.

" . . . For this purpose we are prepared to recommend to

offer the City of Fresno *municipal water* with municipal or domestic priority as they had contracted to sell to the City of Sacramento out of the Central Valley Project.¹⁰⁸ This Class I irrigation water was and still is being sold by the Bureau to the respondent districts for \$3.50 per acre-foot (*Rank v. (Krug) United States*, 142 F. Supp. 1 (1956).) If this Court should overrule this decision of the Court below and affirm that part of the decision of the District Court requiring the respondent officials to furnish Fresno with all needed water before exporting San Joaquin River water out of the county and watershed of origin to the respondent districts (*Rank v. (Krug) United States*, 142 F. Supp. 1 (1956)), but at the same time sustained the decision of the Court below that the respondents could charge \$10.00 per acre-foot for this

the Department a contract to furnish to the City up to 60,000 acre-feet for water to be made available from the Millerton Lake Supply, *subject to sharing deficiencies* on the same basis as *class I water* users in the service area share deficiencies in extremely dry years.

"Sincerely yours,

H. P. DUGAN (Signed)

H. P. DUGAN

Regional Director" (Emphasis ours.)

Letter from H. P. Dugan, Regional Director of Bureau of Reclamation, Region 2, December 3, 1959.

¹⁰⁸The City of Sacramento recently signed a contract with the Bureau of Reclamation purchasing water out of the Sacramento River for \$9.00 an acre-foot containing the following provision:

"City water to be delivered to the City under this contract shall carry all priorities accorded to or for municipal uses under the laws of the State of California and the United States will recognize such priorities."

Minutes of the City of Sacramento, pages 280, 281, Volume 61 of Proceedings of the City Council—1957, dated the 27th day of June, 1957.

Class I irrigation water to the City of Fresno, the United States then would receive \$6.50 an acre-foot more for this Class I irrigation water delivered to the City than they could by delivering it to the respondent districts for \$3.50 per acre-foot.

On the other hand if this Court reversed the Court below and affirmed the decision of the District Court that any charge in excess of the charge for Class I irrigation water (\$3.50 per acre-foot) was unreasonable and then allowed the City of Fresno all of the water it needed at \$3.50 per acre-foot before taking any water out of the county of origin of the San Joaquin River as decreed by the District Court, the United States would still receive \$3.50 per acre-foot for this additional water delivered to the City of Fresno—the same price they are receiving from respondent district. Thus the United States could in no way suffer financial loss if it reversed the Court below and sustained the decision of the District Court.

In any event, as shown by *Swigart v. Baker, supra*, and *Yuma County Water Users' Ass'n v. Schlecht, supra*, the federal courts have the power to decide whether a charge for water from a reclamation project is legal or illegal and unreasonable and that ends the matter where the District Court's finding on unreasonableness has never been attacked.

D. The Finding of the District Court That Any Charge in Excess of Class I Irrigation Water to the City of Fresno (\$3.50 Per Acre-Foot) Is Unreasonable Must Stand.

Having shown that the determination of whether a water rate under a reclamation project is reasonable or unreasonable is strictly a judicial determination, and having shown that an action to make such a determination is not a suit against the United States, we should now point out that since there was no designation in their points on appeal nor any appeal by any respondent in the Court below from the holding of the District Court that any charge to the City of Fresno in excess of the Class I irrigation rate (\$3.50 per acre-foot) was unreasonable. This portion of the District Court's opinion should stand. *Jesionowski v. Boston & M. R.R.*, 329 U. S. 452, 67 S. Ct. 401, 91 L. Ed. 416 (1947). *State of Washington v. United States*, 214 F. 2d 33 (9th Cir.) (1954). The Court below also made a general affirm of this portion of the decision of the District Court.

Neither was any point raised upon this part of the decision of the Court below by any respondent in their petitions for certiorari under Rule 23(c) of this Court. It is therefore respectfully submitted that this holding of the District Court must stand.

We will therefore not go into the testimony of the other parties such as the testimony of plaintiff's engineer Lee that \$1.50 per acre foot was a reasonable price to be charged the City of Fresno¹⁰⁹ nor compare the charge of 25¢ per acre foot charged the Los Angeles

¹⁰⁹K. 295 Deft. Ex. A-79-A and Rep. Tr. 21,975.

Metropolitan Flood Control District for storage of water at Boulder Dam.¹¹⁰⁻¹¹¹

E. Respondent Bureau of Reclamation Officials Are Attempting to and Are Illegally Making a Huge Profit From the Operation of the Central Valley Project and From Municipal Water Offered Appellant City of Fresno, in Violation of the Acts of Congress Authorizing Reclamation Projects in General and the Central Valley Project in Particular.

1. History of Repayment Provisions for the Reclamation Laws of the United States. No Profit Is to Be Made From the Operation of These Projects.

As heretofore shown, illegality constitutes unreasonableness. We now will show that the Bureau is making an erroneous illegal profit from the project.

Congress, on June 17, 1902, (32 Stat. 388) under the leadership of President Theodore Roosevelt, adopted its first Reclamation Act.

This act provided for the construction of reclamation projects in the sixteen western states to be financed by the sale of public lands in these sixteen states, the proceeds from the sale of said lands to be paid into a reclamation fund from which authorized reclamation projects were to be paid. The projects were to repay to the reclamation fund the cost of construction of the project together with the cost of operation and maintenance of the project during the re-

¹¹⁰⁻¹¹¹ (10) A charge of twenty-five cents (\$0.25) per acre-foot shall be made for water delivered to the District hereunder during the Boulder Dam cost repayment period."

United States Department of the Interior Bureau of Reclamation, Boulder Canyon Project Final Reports, Part 1—Introductory, Bulletin 2, "Hoover Dam Power and Water Contracts," page 52.

payment period without profit. This clearly appears from the decisions of this Court.

"The official records show that in 1902 there were in sixteen states and territories 535, 486, 731 acres of public land * * *. A large part of this land was arid * * * with a view therefore of making these arid lands available for agricultural purposes by an expenditure of public money, it was proposed that the proceeds arising from the sale of public lands in those sixteen states and territories should constitute a trust fund to be set aside for use in the construction of irrigation works—the cost of each project to be assessed against the land irrigated and as fast as the money was paid by the owners back into the trust it was again to be used for the construction of other works * * *.

"The general outline of this plan was approved by Congress, which, on June 17, 1902 (32 Stat. 387 at L. 389, Chap. 1093) passed 'An Act Appropriating the Receipts from the Sale and Disposal of Public Lands in Certain States and Territories to the Construction of Irrigation Works for the Reclamation of Arid Lands'."

Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 646, 57 L. Ed. 1143 (1912).

2. Congress Specifically Provided That Each Reclamation Project Was to Repay to the Reclamation Fund Only the Estimated Cost of the Project Together With the Cost of Operation & Maintenance of the Project Over the Period of Repayment.

These reclamation projects, including those providing water to municipalities, were only to be chargeable with two costs of the project: (1) repayment of the es-

timated cost of constructing the project; and (2) the cost and operation of maintenance during the period in which the project was to be paid for.¹¹²

Referring to the Central Valley Project, this Court makes the following pertinent ruling, clearly indicating there was to be no profit made out of the construction and operation of the Central Valley Project but that the Project should only "recoup its cost".

"This project anticipates recoupment of its cost over a 40-year period."

United States v. Gerlach Live Stock Co., 339 U. S. 725, 752, 70 S. Ct. 955, 969, 94 L. Ed. 1231 (1950).

¹¹²"The Statute provides that the cost of the construction of the project shall be charged against the lands within the irrigable limits. The phrase is not expressly defined, and being general by its terms, is not necessarily limited to building, but may include the preservation and maintenance of what has been built."

Swigart v. Baker, *supra*, page 646.

"In pursuance of this act, various works, * * * were constructed and notice was given of the charges that would be made. At first they were stated in a lump sum, cost of building, maintenance, and operation making up the total. After 1906, the charges were separately stated substantially thus: '1. For building, \$..... per acre; 2. For maintenance and operation, \$..... per acre per annum.'"

Swigart v. Baker, *supra*, page 647.

"* * *. The Reclamation Act sets aside all money received from the sale and disposal of public lands in certain states and territories named for the reclamation of the arid lands therein; and this fund is to be kept intact as nearly as possible, by collecting from the water users under each project the estimated cost of construction thereof." (emphasis ours)

Yuma County Water Use. Ass'n v. Schlecht, 262 U. S. 138, 143, 43 S. Ct. 498, 500, 66 L. Ed. 799 (1922).

"In the case of *Yuma County Water Users Association v. Schlecht*, 9 Cir. 1921, 275 F. 885, 888, the court held that the term 'by estimated cost' is not meant the actual exact final sums paid for construction but rather such sums as it is believed after careful computation will cover the expenses directly and fairly connected with the construction of the project."

Indiana Gas and Water Co. v. Williams, 175 N. E. 2d 31, 33 (1961).

3. Repayment of Each Reclamation Project Was to Be Based on the Estimated Construction Cost, Not the Actual Construction Cost, of the Project, Together With the Cost of Operation and Maintenance.

As shown in the decisions of this Court, repayment of each reclamation project was based not on the final actual cost but on the *estimated cost of the project*, together with the cost of operation and maintenance.¹¹³

This Court cited with approval the Feasibility Report that the estimated cost of construction of the Central Valley Project is \$170,000,000; that the annual cost over the 40-year period including all charges would be \$7,500,000.

"Footnote 21. * * * The estimated cost of construction is \$170,000,000 and the annual cost, including repayment of all other charges is \$7,500,000."

United States v. Gerlach Live Stock Co., 339 U. S. 775, 762, 70 S. Ct. 955, 969, 94 L. Ed. 1231 (1950).

¹¹³* * *; these charges to be determined with a view of returning to the reclamation fund the *estimated cost* of the construction of the project, * * * and all moneys received from the above sources shall be paid into the reclamation fund." (emphasis ours)

Swigart v. Baker, *supra*, 647.

"The Reclamation Act sets aside all money received from the sale and disposal of public funds in certain states and territories named for the reclamation of the arid lands therein and this fund is to be kept intact as nearly as possible by collecting from the water users under each project the *estimated cost of construction thereof*." (emphasis ours)

Yuma County Water Users' Ass'n v. Schlecht, 262 U. S. 138, 43 S. Ct. 498, 66 L. Ed. 799 (1922).

"The extent to which the fund will be preserved will depend upon the accuracy of the estimate."

Yuma County Water Users Ass'n v. Schlecht, *supra*.

4. **As Between the Various Class of Water Users Under a Reclamation Project Each Class Was to Be Charged an Equitable Share of the Total Cost of the Project Devoted to Each Class of Water Users Together With an Equitable Proportion of the Operation and Maintenance Cost.**

As shown by the decisions of this Court, the cost of the project to each class of users should be apportioned equitably.

"The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of * * * the project, and shall be apportioned equitably * * *." (emphasis ours)

Yuma County Water Users' Ass'n v. Schlecht,
275 F. 885, 888 (1921).

5. **In 1906 Congress Specifically Authorized the Furnishing of Municipal Water From Reclamation Projects to Cities Within the Immediate Neighborhood of Any Reclamation Project Such as Fresno.**

Fresno lies within a few miles of Friant Dam and the Friant-Kern Canal. It is clearly within the immediate vicinity of the Central Valley Project.

Congress, by the Act of April 16, 1906, 34 Stat. 116, 117, specifically authorized the furnishing of municipal water from reclamation projects to cities within the "immediate vicinity of any reclamation project."¹¹⁴

¹¹⁴"Sec. 4. That the Secretary of the Interior shall, in accordance with the provisions of the reclamation act, provide for water rights in amount he may deem necessary for the towns established as herein provided, and may enter into contract with the proper authorities of such towns, and other towns or cities on or in the immediate vicinity of irrigation projects, which shall have a water right from the same source as that of said project for the delivery of such water supply to some convenient point, and for the payment into the reclamation fund of charges for the same

and specifically provided that rates for municipal water should not be lower than that charged for agricultural water, clearly indicating that Congress did not intend that cities pay more for municipal and domestic water than irrigation water. This clearly indicates that it was not the intention of Congress that the cities were to pay more than the agricultural rate.

In 1935, when Congress approved the Central Valley Project based on the Feasibility Report signed by President Franklin Delano Roosevelt December 2, 1935, Congress expressly provided that water from the Central Valley Project was to supply both municipal and industrial uses. (Feasibility Report, December 2, 1925, Appendix D.)

The Act of August 26, 1937, 50 Stat. 844, expressly provided that the Central Valley Project should furnish *domestic* water. The Central Valley Project Act of August 26, 1937 providing that the Central Valley Project was to furnish both an irrigation and *domestic* supply has been reauthorized by Congress on at least three other occasions: Act of October 17, 1940, 54 Stat. 1198; Act of October 14, 1949, 63 Stat. 852; Act of September 26, 1950, 64 Stat. 1036.

6. In 1939 Congress Authorized an Additional Municipal Charge, to Wit: Interest Not to Exceed 3½ Percent on the Portion of the Project to Municipalities.

From 1902 until 1939 municipalities were charged two things under a reclamation project: (1) an equitable share of the cost of construction of that portion

to be paid by such towns or cities, which charges shall not be less nor upon terms more favorable than those fixed by the Secretary of the Interior for the irrigation project from which the water is taken." (emphasis ours)

Act of April 16, 1906, 34 Stat. 116-117.

of the project devoted to municipal water supply; and (2) an equitable proportion of the cost of operation and maintenance of that part of the project devoted to municipal use.¹¹⁵

In 1939 Congress specifically added a third charge and allowed the Department of the Interior to charge interest on *municipal water* and the equitable proportion of the project devoted to municipal water supply.¹¹⁶

By specifically referring to interest in the 1939 Statute, Congress, by inference, prohibited any other charge to municipalities other than interest not to exceed $3\frac{1}{2}$ percent in addition to the charge for an equitable allocation of the construction cost of the project and an equitable charge for the cost and maintenance of that portion of the project devoted to municipal use.

"Generally a legislative affirmative description implies denial of nondescribed powers." (Syllabus)

¹¹⁵"The official reports show that in 1902 there were in sixteen states and territories 535,486,731 acres of public land * * *. A large part of this land was arid * * *. With a view therefore of making those arid lands available for agricultural purposes by an expenditure of public money, it was proposed that the proceeds arising from the sale of all public lands in these sixteen states and territories should constitute a trust fund to be set aside for use in the construction of irrigation works,—the cost of each project to be assessed against the land irrigated and as fast as the money was paid by the owners back into the trust it was again to be used for the construction of other works * * *."

"The general outline of this plan was approved by Congress which on June 17, 1902 (32 Stat. at L. 389, Chap. 1093) passed 'An Act Appropriating the Receipts from the Sale and Disposal of Public Lands in Certain States and Territories to the Construction of Irrigation Works for the Reclamation of arid lands.'"

—*Swigart v. Baker*, 229 U. S. 187, 33 S. Ct. 645, 646, 57 L. Ed. 1143 (1912).

¹¹⁶Act of August 4, 1939, 53 Stat. 1187, 1194.

Continental Casualty Co. v. United States, 314
U. S. 527, 62 S. Ct. 393, 86 L. Ed. 426
(1942)

The Secretary of the Interior and the Chief of the Bureau of Reclamation set an interest charge on the proportion of the construction costs allocated to municipal water under the Central Valley Project which in 1952 was fixed at $2\frac{1}{2}$ percent¹¹⁷ at which time all of those features of the Central Valley Project involving the San Joaquin Valley, the City of Fresno and this case had been contracted for if not completed.

7. The Bureau of Reclamation Is Making Huge Profits Out of the Operation of the Central Valley Project.

On June 23, 1962, according to the Associated Press releases from Colorado Springs, Colorado, Reclamation Commissioner, Floyd E. Dominy, admitted that the Bureau will have \$200,000,000.00 in surplus revenue or profit in the payout period of the presently authorized Central Valley Project.¹¹⁸

The University of California, in a report prepared for the Assembly Interim Committee of the State of California (1955), estimated that the Central Valley Project at that time (1955) if no further units were added would have "an excess of revenue over construction costs over \$221,619,800.00 available for payment of interest and for surplus", which would lead to "a prospective project surplus of \$179,727,900.00"

¹¹⁷ $2\frac{1}{2}$ percent in 1954. (Footnote 10. U. S. Bureau of Reclamation. Region 2, *Central Valley Project Repayment Analysis* (November 25, 1952).

¹¹⁸Associated Press Release of Reclamation Commissioner Floyd E. Dominy, June 23, 1962. Appendix "G" hereof. The court can take judicial notice of public statement of officials.

in the year 2005 if present project is continued to that date.¹¹⁹

It is submitted that since the contract price of municipal water to Fresno is still open that no profit should be charged other than interest as authorized under the Act of August 4, 1939, to the City of Fresno and that any such charge of profit would be illegal and in excess of the authority conferred upon respondents.

8. The Use of Profit From Municipal Water to Reduce the Rates of Agriculture Is Illegal.

As has been shown, there is no provision in any act of Congress authorizing any charge for municipal water other than for repayment for the equitable proportion of the estimated costs of construction and the equitable proportion of the cost of operation and maintenance of the project together with an interest component not to exceed $3\frac{1}{2}\%$ per annum which in fact has been only 2% to $2\frac{1}{2}\%$ per annum as fixed by the Secretary.¹²⁰ It has also been shown that in view of the affirmative legislative description of what might be charged, there is an implied denial of undescribed powers to the Respondent Bureau of Reclamation officials which would include any illegal profit charged. *Continental Casualty Co. v. United States*, 314 U. S. 527, 62 S. Ct. 393, 86 L. Ed. 426 (1942).

However, the respondent officials in their public bulletins admit that they are making a profit in addition :

¹¹⁹Central Valley Project: Federal or State? Report Prepared for Assembly Interim Committee on Conservation, Planning and Public Works, House Resolution No. 177, 1953, page 82.

¹²⁰ $2\frac{1}{2}\%$ percent in 1954. (Footnote 10, U. S. Bureau of Reclamation, Region 2, Central Valley Project Repayment Analysis (November 25, 1962).)

to the interest, construction cost and cost of operation and maintenance for municipal water in the Central Valley Project and using this to illegally reduce the price of agricultural water.¹²¹

It is submitted that this illegal activity of the Bureau of Reclamation in the Central Valley Project is illegal and respondents in so making such illegal profits are exceeding the authority conferred upon them by the acts of Congress. We would appreciate a ruling by this Court on this important point which is so important to the cities of California and the nation.

It is submitted that the same argument could also be made that municipalities should share in commercial power sales revenues.

It is also submitted that a definition by this Court of what constitutes "municipal water" determining whether such a term means simply Class I irrigation water sold to cities or whether it means water with municipal priorities in time of shortage would be helpful.

¹²¹ " * * * It is contemplated that the net revenues from commercial power and municipal and industrial water in excess of that required for repayment of the allocation of these functions and the interest component from power and municipal and industrial water will be applied in the repayment of project costs allocated to irrigation * * * "

Repayment Histories and Payout Schedules, 1952, Second Edition, United States Department of the Interior, Bureau of Reclamation, p. 39.

"The amount of financial assistance by municipal and industrial water is the net revenue available after the retirement of the M & T investment. This amount is applied toward repayment of the irrigation plant investment annually as it becomes available."

Repayment Histories and Payout Schedules, 1952, Second Edition, United States Department of the Interior, Bureau of Reclamation, excluding Trinity River Division.

It is further submitted that any interest charge if allowed on the cost allocated to water for municipalities should go back to the reclamation fund or the federal treasury and not used to assist agricultural repayment as was done from 1944 to 1952.

We submit that the following statement of the California Water Rights should govern here,

"Here, the Federal Government makes no claim that it is operating or *proposes to operate the Central Valley Project for the benefit of the Federal Treasury* but rather, precisely as was proposed by the Water Project Authority which originally contemplated its construction and operation * * * in all respects for the welfare and benefit of the people of the State, for the improvement of their prosperity and their living conditions * * * (Water Code, Sec. 11126). The State authorization of the project in 1933 (Stats. 1933, Chapter 1042) has from time to time been refined and added to by amendments but except for additional units, remains essentially as it was in the beginning." (emphasis ours)

State of California, State Water Rights Board
Decision D 935, June 2, 1959, page 92.

F. The United States Has Waived Its Immunity to Suit. The Court Below Is in Error in Holding That This Suit Could Not Be Maintained as a Class Action Suit Against the United States Merely Because Several of the Named Plaintiffs in the District Court Had Very Small Amounts of Prescriptive Rights and That the Rights of All Parties Had Not Been Ruled on by the District Court.

Even if we should assume that the United States was an indispensable party and that this is a suit against the United States — something we feel we have shown in the preceding chapters to be untrue — nevertheless, even in that event the United States has waived its immunity to suit under the Act of July 10, 1952, 66 Stat. 516, and other acts and the present action can therefore be maintained.

The Court below conceded the possibility that plaintiffs holding riparian and overlying percolating water rights might represent a class action suit under the Act of July 10, 1952, 66 Stat. 516, against the United States. We quote:

“It may well be that those claiming riparian and overlying rights could properly be treated as a class, * * *.”

State of California, United States of America, v. Rank, 293 F. 2d 340, 348 (1961).

However, the Court below erroneously held that merely because several of the named plaintiffs had very small amounts of prescriptive and appropriative rights that this suit could not be maintained as a class action against the United States under the waiver of immunity.

"(3) These plaintiffs, as claimants of appropriative or prescriptive rights, cannot however, speak for others 'similarly situated.' "

State of California, United States of America v. Rank, 293 F. 2d 340, 348 (1961).

The Court below also erroneously ruled that all necessary parties were not joined.

"In two respects we feel that it has failed to measure up. First, all claimants have not been joined."

State of California, United States of America v. Rank, 293 F. 2d 340, 348 (1961).

Neither of these rulings are correct as will now be shown.

"However, before we discuss these two points we feel that we should, for the convenience of the Court, quote the statute in question and briefly discuss the applicability of waiver of immunity statutes.

(a) *The Waiver of Immunity to Suit Under the Act of July 10, 1952, Should Be Liberally Construed.*

The Act of July 10, 1952, 66 Stat. 560, reads as follows:

"Suits for Adjudication of Water Rights — Joinder of the United States as defendant: Costs:

"Sec. 208. (a) Consent is * * * given to join the United States as a defendant in *any suit* (1) for the adjudication of rights to the use of water of a river system or * * * (2) for the administration of such rights where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law by purchase, by exchange, or otherwise, and the

United States is a necessary party to such suit. The United States, when a party to such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit."

"(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

"(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream."

Act of July 10, 1952, 66 Stat. 560 (43 U. S. C. A. Sec. 666).

Where Congress gives a broad waiver of immunity of the United States from suit as here by the use of the words "*any suit*," the statute should be liberally construed.¹²²

¹²² * * *. As applied to the State of New York Judge Cardozo said in language which is apt here: 'No sensible reason can be imagined why the State, having consented to be sued, should thus paralyze the remedy' * * * 243 N. Y. at 147, 153 N. E. at 29. 'A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen' * * *. When authority is given, it is liberally

The courts by refinement of construction should not destroy the citizen's right to sue.¹²³

There should be no resort to the legislative history of the enactment of statutes, if the language of the statute is plain and unambiguous, as here, where the statute refers to "any suit", since such legislative history may only be resorted to for the purpose of solving doubt, not for the purpose of creating it.¹²⁴

construed.' *United States v. Shaw*, 309 U. S. 495, 501, 60 S. Ct. 659, 661, 84 L. Ed. 888."

United States v. Yellow Cab Co., 340 U. S. 543, 554, 71 S. Ct. 399, 406, 95 L. Ed. 523 (1951).

"(Sovereign) immunity * * * undoubtedly runs counter to modern democratic notions of the moral responsibility of the State. Accordingly, courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of government and to confirm Mailland's belief expressed nearly fifty years ago, that 'it is a wholesome sight to see' 'the Crown' sued and answering to its torts."

Larson v. Domestic and Foreign Commerce Corporation, 337 U. S. 682, 723, 69 S. Ct. 1457, 1478, 93 L. Ed. 1628 (1949).

¹²³* * *. In argument before a number of District Courts and Courts of Appeal, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson v. Hayes Constr. Co.*, 243 N. Y. 140, 147, 153 N. E. 28, 29-30: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.' (emphasis ours)

United States v. Aetna Casualty & Surety Co., 338 U. S. 366, 383, 70 S. Ct. 207, 216, 94 L. Ed. 171 (1949).

¹²⁴"Although, of course, there should be no resort to the legislative history of the enactment of statutes, if the language of the statute is plain and unambiguous, as here, since such legislative history may only be resorted to for the purposes of solving doubt, not for the purpose of creating it."

Van Camp & Sons Co. v. American Can Co., 278 U. S. 245, 49 S. Ct. 112, 73 L. Ed. 311 (1929);

Russell Motor Car Co. v. United States, 261 U. S. 514, 43 S. Ct. 428, 67 L. Ed. 778 (1923).

(b) *The Present Action Clearly Comes Within the Term "Any Suit."*

"Statutes should be construed according to the plain obvious meaning of the Statute."

Lynch v. Alworth Stephens Co., 267 U. S. 364, 45 S. Ct. 274, 57 L. Ed. 660 (1925).

Said Chief Justice Marshall in *Cohens v. Commonwealth of Virginia*, 19 U. S. 264, 6 Wheat. 264, 405, 5 L. Ed. 257 (1821): "What is a suit. We understand it to be prosecution or pursuit of some claim, demand or request; in law language, it is the prosecution of some demand in a *court* of justice." Speaking also in *Weston v. City Council of Charleston*, 27 U. S. 449, 2 Pet. 249, 7 L. Ed. 481 (1820) he said: "The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a *court* of justice, by which an individual pursues that remedy in a *court* of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a *court* of justice, the proceeding by which the decision of the court is sought, is a suit."

In *Ex parte Collet*, 337 U. S. 55, 58, 69 S. Ct. 944, 946, 93 L. Ed. 1207 (1949), "any civil action" includes *pending* actions.

"* * * any * * * us used in its broadest and fullest form without qualification or exception."

Richardson v. Ainsa, 218 U. S. 289, 31 S. Ct. 23, 54 L. Ed. 1044 (1910).

"Any has the meaning of 'all'."
3 C. J. 232.

"'Any cause or matter' is intended to cover every proceeding of whatever character in any court, of whatever kind. * * *"

3 C. J. 235, Note 72(a).

As correctly held by the Court below and the District Court this suit involves conditional injunctive decrees known as a physical solution, which conditional injunctive decrees have long been recognized as within the destination of "suits" in this and other federal courts.

In essence a decree of physical solution is but the conditional injunctive decree of a court of equity.

This Court has approved the conditional injunctive decree known as a physical solution as a proper "suit" on a case involving the Central Valley Project.¹²⁵

(c) *Effect of Other Statutes.*

In construing the Act of July 10, 1952, 66 Stat. 560, we should look at other similar statutes.¹²⁶

125" * * * If * * * one seeks to appropriate the water wasted or not put to any beneficial use, it is *obligatory* that he find some physical solution, at his expense, to preserve existing prior rights, * * *. Peabody v. City of Vallejo, 2 Cal. 2d 351, 40 P. 2d 486; City of Lodi v. East Bay Municipal Utility District, 7 Cal. 2d 316, 60 P. 2d 439; Hillside Water Co. v. City of Los Angeles, 10 Cal. 2d 677, 76 P. 2d 681; City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 52 P. 2d 585; Los Angeles Flood Control District v. Abbot, 24 Cal. App. 2d 728, 76 P. 2d 188.

"It would appear that plaintiffs were not deprived of all of their rights as riparian owners by the amendment to the California Constitution. Apparently, they had the right to demand that defendant provide such a *physical solution* as would permit them to continue to receive so much of the waters of San Joaquin River as they could beneficially use; or, if such a solution was impossible, that they had the right to demand of the defendant compensation for the deprivation of the rights to so much of the water they had formerly received as they could beneficially use." (emphasis ours)

Gerlach Live Stock Co. v. United States, 111 Ct. Cls. 1, 81, Aff. 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

126" In *Keifer & Keifer v. Reconstruction Finance Corporation*, 1939, 306 U. S. 381, at page 394, 59 S. Ct. 516, at page 520, 83 L. Ed. 784, the Court held with relation to the waiver-of-immunity statute concerning the Reconstruction Finance Corpora-

One such statute is the Basic Reclamation Act of July 17, 1902, 32 Stat. 388, as amended which reads as follows:

"Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the *Secretary of the Interior*, in carrying out the provisions of this Act, shall proceed in conformity with such laws * * *." (emphasis ours)

Act of June 17, 1902, 32 Stat. 388, 390, 43 U. S. C. 391.

Mr. Justice Douglas and Mr. Justice Black in their concurring opinion in *Gerlach Live Stock & Cattle Co. v. United States* held the Act of June 17, 1902, had waived the immunity of the United States on reclamation projects.¹²⁷

tion, that in ascertaining the Congressional will, the Court was not limited to the single statute, and said, to do so 'is to impute to Congress a desire for incoherence in a body of affiliated enactments and for drastic legal differentiation where policy justifies none. A fair judgment of the statute in its entire setting relieves us from making such an imputation of caprice.'"

Rank v. (Krug) United States, 142 F. Supp. 1, 81 (1956).

¹²⁷"Congress to be sure, has full power to relinquish its immunity from suit for the taking. See *Ford & Son v. Little Falls Fibre Co.*, 280 U. S. 369, 377, 50 S. Ct. 140, 141, 74 L. Ed. 483; *United States v. Realty Co.*, 163 U. S. 427, 440, 16 S. Ct. 1120, 1125, 41 L. Ed. 215. And I think it has done so—not by the Acts appropriating funds for the project but by the *Reclamation Act of 1902*, 32 Stat. 388, 43 U. S. C. 371 *et seq.* * * *."

"The Act applies solely to the 17 western States. It deals with reclamation projects as its title indicates. The Central Valley Project is such a project." (emphasis ours)

United States v. Gerlach Live Stock Co., 339 U. S. 725, 757, 70 S. Ct. 955, 972, 94 L. Ed. 1231 (1950).

It is submitted that if the immunity of the United States was waived so far as damages are concerned, since the Basic Reclamation Act of 1902 makes the Bureau of Reclamation subject to all state laws—which would include the injunctive processes of the courts—the immunity must have been waived as regards an equitable suit like the present one.

(aa) The Decision of the California Water Rights Board of June 2, 1959.

Appellant City of Fresno in its complaint in intervention had asked for an adjudication in the District Court of the priority of appellant City of Fresno's filings to appropriate water of the San Joaquin River over those of the United States [R. 182-1] (*Rank v. (Krug) United States*, 142 F. Supp. 1, 121 (1956)). The District Court held that the State Administrative Agency must first pass on that and allowed them to do so. This agency, then the State Engineer, is now the California Water Rights Board.

After general advertising as required by Section 1300 to 1316 of the California Water Code and Section 712, Article 11 of the California Administrative Code by the California Water Rights Board, all parties to this action including the City of Fresno, the United States and every respondent irrigation district appeared before the State Water Rights Board. The State Water Rights Board denied the application of the City of Fresno to appropriate water and granted those of the United States with certain reservations but made the whole decision subject to final decision *in this case*. Although by statute the United States could petition the California courts for a review of this decision (Sec. 1094.5 California Code of Civil Procedure; the *Times*-

cal Case, 44 C. 2d 90, 280 P. 2d 1 (1956)), it did not do so. The City of Fresno petitioned for a review but dismissed its application with prejudice. We submit then that the matter of the waiver of immunity of the United States and the jurisdiction of this Court over the United States is *res adjudicata* as against all parties. (*Goodspeed v. Great Western Power Co.*, 33 C. A. 2d 245.)

The Court below in support of its ruling that the United States has not waived its immunity to suit, quotes *Miller v. Jennings*, 243 F. 2d 157, 159 (5th Cir.) (1957), a decision with a dissenting opinion.

The above case is clearly distinguishable by the fact that only three irrigation districts were involved in that action and in which action the United States was a party—and of these one district, the largest, The Elephant Butte Irrigation District, lying upstream from the other two districts, *was completely left out of the suit*, and all interested parties and every parcel of land were not represented as here nor was there any such proceeding after advertisement as we had before the Water Rights Board here. Moreover, the State of Texas was not a party to the suit as was the State of California in this case, which entered this suit stating "the state appears in its sovereign governmental and proprietary capacities, in its own interest and for the protection of its own rights; also as *parens patriae*, in the interest of and for the protection of all its citizens, residents, land owners and water users and its agencies"¹²⁸ and asked a physical solution of the rights of all parties and of all its citizens and land owners.

¹²⁸R. 88, State of California's Amended Complaint in Intervention.

(d) *The Court Below Erroneously Held That the Named Plaintiffs Could Not Maintain This Suit as a Class Action Against the United States Because a Few of Them Had Infinitesimal Amounts of Prescriptive and Appropriative Rights.*

The Court below held that this action could not be maintained as a class action suit against the United States under the waiver of immunity Act of July 10, 1952, merely because some of the named plaintiffs had a small amount of prescriptive water rights.

“(3) These plaintiffs, as claimants of appropriative or prescriptive rights, cannot, however, speak for others ‘similarly situated.’ ”

State of California, et al. v. Rank, 293 F. 2d 340, 348 (1961).

In the first place the District Court held that this was a proper class action. The discretion of the trial Court in this regard should not be reversed except for abuse of discretion.¹²⁰

The Court below then reversed the trial Court, holding that the inclusion of these named plaintiffs having an infinitesimal amount of prescriptive and appropriative rights prevented the operation of the waiver of immunity statute — the Act of July 10, 1952, 66 Stat. 560.

However, these prescriptive and appropriative rights of these six named plaintiffs were so small and infinitesimal that they are not grounds for reversing the Dis-

¹²⁰“The district court has a discretion with respect to whether an action may be maintained as a class action and in a proper case the exercise of that discretion may not be disturbed by an appellate court except for abuse. F.R.C.P. rule 23, 28 U. S. C. A. following Section 723c. (Syllabus)

Weeks v. Bareco Oil Co., 125 F. 2d 84 (1941).

strict Court. They amounted to only 14.63 second-feet of the flows of the San Joaquin River of 40,000 second-feet. The Assistant Attorney General of the State of California in his letter to the Court below described these prescriptive and appropriative rights of the named plaintiffs as "de minimis."¹³⁰

"The total, 6475 gallons per minute, is but 14.43 cubic feet per second. This would seem to be a *de minimis* amount in view of the relative volumes involved in this case."

R. 363 (New Volume), Letter by B. Abbott Goldberg.

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"IN UNITED STATES DISTRICT COURT
STATE OF CALIFORNIA

Office of the Attorney General
Department of Justice
State Building, San Francisco 2

December 27, 1960

"Frank H. Schmid, Esq.,
Clerk, U. S. Court of Appeals,
Post Office Building,
Seventh and Mission Streets,
San Francisco 1, California.

Dear Mr. Schmid:

Re: California et al. v. Rank et al., No. 15840

"This is in response to the court's inquiry set forth in your letter of December 15 to Mr. Rowe.

"The appropriative and prescriptive rights, as distinguished from riparian rights, involved in the court's inquiry of December 15, 1960, are:

Record	Name	Gallons per Minute	Date	Preciptives or Appropriative
962	Folsom	1400	1909	A & P
967	Cobb	1000	1927*	P
970	Cobb	1025	1938*	P
974	Cobb	1025	1928*	P
976	Sims	1000	1902*	A & P
978	Sims	1025	1927*	P

*Stated in terms of years prior to filing the action. The action was filed on September 25, 1947, R. 78."

R. 362 (New Volume), Letter by B. Abbott Goldberg.

De minimis is defined by Webster's New International Dictionary as follows:

"de minimis * * * Law. The law takes no account of trifles; — a maxim applicable to cases where it is impracticable for the law to adjust the rights of parties according to trifling changes or difficulties, as in case of alluvion in the change of a stream's banks, or parts of a day in the ordinary reckoning of time, etc."

Since these rights were therefore trifles and impossible for the Court to consider, this was not ground for reversal.

This Court has many times held that a trial court should not be reversed for immaterial or infinitesimal errors or for immaterial errors.

"No judgment should be reversed in a court of error, when it is clear that the error could not have prejudiced and did not prejudice the rights of the party against whom the ruling was not made."

Lancaster v. Collins, 115 U. S. 222; 6 S. Ct. 33, 29 L. Ed. 373, (1885).

"We do not reverse cases for unsubstantial error. Abstract inerrancy is hardly possible in a trial * * * it is never essential to a valid trial."

Maryland Casualty Co. v. Reid, 76 F. 2d 30 (5th Cir.) (1935); . .

Anchor Casualty Co. v. McGowan, 168 F. 2d 323 (1948).

Moreover, the District Court found at least four of the named plaintiffs (Leslie L. Howard, Robert C. Arnold, Henry H. Engelman and Emma Engelman) had no prescriptive or appropriative rights [Findings

10, 11 and 12, R. 817-821], but only riparian and overlying rights; and found that the appellant City of Fresno had overlying rights which the California courts held to be the same or analogous to riparian rights (*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 C. 2d 489, 45 P. 2d 972 (1935)). These named plaintiffs were competent to represent the class against the United States. This Court and other federal courts have consistently held that it is possible for only one named plaintiff to represent a class in a class action suit (*Mullaney v. Anderson*, 342 U. S. 415, 72 S. Ct. 428, 96 L. Ed. 458 (1952)).

"* * * Rule 23, Federal Rules of Civil Procedure 28 U. S. C. A., provides that if persons constituting a class are so numerous as to make it impracticable to bring them all into court, such of them, *one* or more, as will fairly insure adequate representation may sue or be sued. Assuming that defendants' offer of proof in this respect had been received, we hold that this suit was properly instituted as a class action, providing proof shows *one* of the forty-two qualifies to represent the class." (emphasis ours)

Hunter v. Atchison, T. & S. F. Ry. Co., 188 F. 2d 294, 301 (1951); Cert. denied 342 U. S. 819, 72 S. Ct. 33, 96 L. Ed. 619; Rehearing denied 342 U. S. 889, 72 S. Ct. 172, 96 L. Ed. 667 (1951).

Finally, if there are any other owners of water rights or other parties who should be brought into this case—if any there be—they could easily be ordered brought into this case by this Court at this time. It would be extremely unfair and unjust after the huge expenditure

of time and money in this case to dismiss this suit against the United States and possibly start over again. As was stated by the Supreme Court in *Mullaney v. Anderson, infra*:

“* * *. To dismiss the present petition and require the * * * plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration * * *.”

Mullaney v. Anderson, 342 U. S. 415, 417; 72 S. Ct. 428, 430, 96 L. Ed. 458 (1952).

“* * *. Rule 21 of F. R. C. P. 28 U. S. C. A. authorizes the addition of parties ‘by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.’” (emphasis ours)

Mullaney v. Anderson, 342 U. S. 415, 417, 72 S. Ct. 428, 430, 96 L. Ed. 458 (1952).

It is therefore submitted that the first reason given by the Court below for holding that the named plaintiffs could not represent the class action is in error and that the immunity of the United States under the Act of July 10, 1952, 66 Stat. 560, had not been waived in this case was clearly in error.

(e) *The Finding of the Court Below That All Claimants were Not Joined in this Action Is in Error.*

The Court below held:

“The question remains whether the suit at bar was for such a general adjudication of a river system as was contemplated by Congress.

“In two respects we feel that it has failed to measure up. First, all claimants have not been joined.”

State of California, United States of America v. Rank, 293 F. 2d 340, 347-348 (1961).

In the first place it will be observed that the Court overlooked the words "or other source" in the Act of July 10, 1952. Friant Dam is clearly such "other source" in this action. It will be remembered that no water was to be allowed to flow below Gravelly Ford Canal.

The United States except for the water in Mendota Pool (including water from the pool) for which the Central Valley Project provided an exchange and substitute of the waters from the Sacramento River by means of the Delta-Mendota Canal, had taken either by eminent domain or condemnation all rights below Gravelly Ford Canal. The United States was therefore the only necessary party below Gravelly Ford Canal.

The water of the San Joaquin River out of Friant was to go to the districts along the Madera and Friant-Kern Canals, the City of Fresno and the riparian landowners between Friant Dam and Gravelly Ford Canal.

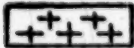
"9.(a) Defendant's plan, as modified contemplated among other things, that the United States should eventually store and divert to nonriparian use the waters of the San Joaquin River originating above Friant Dam and formerly flowing at or below Gravelly Ford, except for releases from Friant which would be for one or more of three purposes: (1) to satisfy riparian rights between Friant and Gravelly Ford; * * *." (emphasis ours)

Wolfsen v. United States, 162 F. Supp. 403, 411 (1958).


All the respondent irrigation districts having contracts to water from Friant Dam were parties to this action. As the Bureau granted new contracts to districts or


other parties, the plaintiffs in the District Court moved to join in such other districts or others receiving contracts as party defendants. Thus, on July 27, 1954, plaintiffs moved to add Pacific Gas & Electric Company, a corporation, Consolidated Irrigation District, a public corporation, and International Water District, a public corporation. Judge Hall granted the Motion to join these districts. The Consolidated Irrigation District had only a temporary contract for one year and filed a disclaimer in the action.

As regards those owners claiming water rights in the San Joaquin River between Friant Dam and Gravelly Ford their rights consisted of three types: (1) Roughly 42 of these owners had purchased their lands from Miller & Lux under which contracts to purchase Miller & Lux retained the water rights and as stated they are shown on Defendants' Exhibit A-9-A-1 [R. 2340, Rep. Tr. 13,361] with the following designation:



These reserved rights were found by the District Court to have been purchased by the government from Miller & Lux under the Purchase Agreement dated July 27, 1939 [Deft. Ex. A-48-A, Rep. Tr. 17,602]; (2) 101 owners of lands along the river between Friant Dam and Gravelly Ford who had executed contracts for the purchase of their water rights by the United States are designated on Defendants' Exhibit

A-9-A-1 as follows  ; (3) the balance of these holdings, consisting of 57 holdings [Deft. Ex. A-9-A-1, R. 2340, Rep. Tr. 13,361], are designated as

follows:  have refused to sign contracts with the United States and are either named plaintiffs

or have come into the trial Court and have asked that the plaintiffs be allowed to represent them or are contributors to plaintiffs who are representing them as members of a class.

As the Court will notice on [R. 2340; Deft. Ex. A-9-A-1; Rep. Tr. 13,361], every parcel of land between Friant and Gravelly Ford is set forth and described. Many weeks were spent at the trial in the Court below establishing in detail which parcels were riparian to the river and the rights to each parcel.

The trial Court made findings on the specific rights of each and every one of these 200 holdings, for example: In Finding 18, R. 763, the trial Court listed each parcel whose owners had executed contracts for the purchase of their water rights by the United States.¹³¹

¹³¹"Finding 18. The court finds that at the time of the filing of the above entitled action or during the course of the trial herein, the owners or former owners of those certain lands located in the Counties of Madera and Fresno, State of California, and designated as Parcels 1, 2, 5, 6, 9, 10, 11, 13, 15, 16, 17, 18, 19, 21, 24, 25, 31, 32, 33, 34, 36, 38, 43, 44A, 45, 47, 52, 53, 54, 56, 57, 61, 64, 65, 66, 67, 69, 73, 74, 75, 76, 77, 78, 79, 81, 84, 85, 90, 92, 99B, 102A, 102B, 103, 104, 108, 109, 113, 114, 115, 120, 122, 123, 125, 126, 127, 128, 129, 130, 132, 133, 136, 139, 156, 159, 161, 162, 169A, 169B, 171, 173, 175, 179, 185, 186, 188, 189, 193, 194, 195, 200, 201, 203, 205, 208C, 211, 212, 214 and 215 of Exhibit 1 of these findings had or have executed contracts with the defendant United States of America, for adjustment of water rights appurtenant to said above numbered and described parcels of lands set forth in this finding between Friant Dam and the vicinity of Gravelly Ford, which said contracts contain, among others, the following provisions or 'provisions substantially similar,' affecting the water rights of the owners of said parcels of land in and to the waters of said San Joaquin River."

R. 763, Finding 18.

The Court then made a finding of the specific provisions that these landowners had signed in their contracts involving their water rights.

In Finding 17, R. 752, the Court specifically listed all owners who had purchased their lands from Miller & Lux, Inc., reserving to Miller & Lux their water rights, which rights have since been bought by the United States.¹³² Each distinct reservation and water right now owned by the United States and covering these parcels was set out at pages 761 and 762 of the Record. After weeks of testimony the District Court also made findings as to which parcels of land between Friant and Gravelly Ford Canal had riparian water rights.¹³³

¹³² Finding 17. The court finds that those certain lands located in the Counties of Madera and Fresno, State of California, and designated as the following Parcels:

118, 121, 134, 135, 137, 138, 141, 143A, 143B, 144, 146, 148, 151, 154A, 154B, 155, 158, 163, 164, 165, 167, 172, 176, 177, 178, 181, 182, 183, 187A, 187B, 190, 191, 192, 197, 198B, 198C, 199, 204, 206, 207, 209 and 210 * * *."

R. 752, Finding 17.

¹³³ Finding 19. The court finds that that portion of the following numbered parcels of lands * * * were at the time of the filing of plaintiffs' complaint at all times mentioned in plaintiffs' complaint as amended and supplemented and now are riparian to said San Joaquin River * * * now are entitled to pump, take and divert waters of said San Joaquin River and use the same on the respective parcels of said lands * * * for present and future beneficial uses upon said lands * * *.

3A, 3B, 4, 7, 8, 12, 14, 20, 22, 23, 26, 27, 28, 29, 30, 35, 40, 41A, 41B, 41C, 42, 48, 49, 50A, 50B, 51, 59, 63, 68, 70, 71, 72, 82, 83A, 83B, 87, 88, 97A, 97B, 100, 101, 106, 131, 140, 145, 147, 149, 150, 152, 153, 157, 160, 168, 208B, 208E, and 208F.

37, 39, 44B, 46A, 46B, 55, 58, 60, 62A, 62B, 80, 86A, 86B, 86C, 89, 91, 93, 94, 95, 96, 98A, 98B, 98C, 99A, 99C, 105, 107, 110, 111, 112, 116, 117, 119, 124, 142, 166, 170A, 170B, 174, 180, 184, 196, 208A, 208D, 208G, and 213."

R. 768, 769, Finding 19.

(f) *If All Necessary Parties Have Not Been Joined, the Appellant Asks This Court for Permission to Join Them at This Time and for an Order to Extend Over Until They Are Joined.*

It is submitted that if all the parties have not been joined that this Court has the power and the duty at this time to allow them to be joined.

"The propriety of the allowance of an amendment of the complaint pending on appeal is well settled. See *Mullaney v. Anderson*, 342 U. S. 415, 72 S. Ct. 428, 96 L. Ed. 458."

United States v. Coson, 286 F. 2d 453 (9th Cir.) (1961).

"As the case stands, it is not too late to amend the bill by making the proper parties. The rule in equity permitting it to be done is this: that on the hearing on the cause even upon an appeal *an order may be made for the cause to stand over with the liberty to the plaintiff to amend by ordering proper parties.*" (emphasis ours)

Lewis v. Darling, 57 U. S. 1, 16 Howard 1, 14 L. Ed. 819, 822 (1853).

"Rule 21 of F. R. C. P. 28 U. S. C. A. authorizes the addition of parties 'by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.' (emphasis ours)

Mullaney v. Anderson, 342 U. S. 415, 417, 72 S. Ct. 428, 430, 96 L. Ed. 458 (1952).

If this Court feels that all of the parties have not been joined in this action who should have been joined, then we ask that the cause stand over and that we be allowed to join them.

(g) *The Court Below Also Erroneously Held That the Rights of the Named Plaintiffs and the Class They Represent Have Not Been Established as Between Themselves.*

The Court below stated the following:

“* * *, neither the relief prayed for nor the decree includes the establishment of the rights of the claimants as between themselves.”

*State of California, United States of America
v. Rank*, 293 F. 2d 340, 347-348 (1961).

Although it is submitted that in a class action it is not necessary in the decision to state the rights of the various members of the class as between themselves¹³⁴—that being left for a separate proceeding—the District Court did however determine the rights of the claimants between themselves. The Court as shown by Finding 19, R. 768, 769 and Judgment 23 [R. 837] divided the waters of the San Joaquin River between Friant Dam and Gravelly Ford in accordance with the number of acres of each of the parties of particular crops growing on said acres and in accordance with an allowance for use of water for each acre of crop growing on said lands of the plaintiffs and their class.

The District Court therefore did determine the right to use of water as among themselves when it divides the waters between the owners in accordance with the

¹³⁴“There is no question but that the amount recoverable by each possible claimant is different, both as to the basic figure of percentage of profit denied them and also as to amount of gasoline sold. This factor is not decisive of a class action.

Weeks v. Bareco Oil Co., 125 F. 2d 84, 91 (1941).

number of acres of particular crops growing on the lands of said owners.¹³⁵

In fact the Court went so far as to divide the domestic use of water between the plaintiffs and the class they represent based upon the number of human beings located on each parcel of land.¹³⁶

¹³⁵"Finding 23. The court finds that the past, present and future use of the following amounts of water for (1) consumptive use, (2) crop irrigation requirements, (3) farm delivery requirements, (4) effective precipitations, and (5) irrigation efficiency %, within the boundaries of the lands set forth and described in Exhibit 3 hereof (The Lee Line), excepting the lands within Tranquillity Irrigation District, is a beneficial use for agricultural purposes of the water of said San Joaquin River by surface diversion or by pumping underground percolating waters from wells lying within the boundaries of Exhibit 3 of these findings (The Lee Line):

Crop	Consumptive use	Effective Precipitation Acre feet	Crop Irrigation requirement per acre	Farm Delivery requirement	Irrigation efficiency %
"Alfalfa	3.42	0.38	3.04	4.05	75
Irrigated pasture	3.75	0.38	3.37	5.20	65
Cotton	2.38	0.38	2.00	2.85	70
Irrigated hay and grain	1.22	0.38	0.84	1.10	75
Truck	2.30	0.38	1.92	2.85	65
Misc. field crops	1.60	0.38	1.22	1.75	70
Deciduous fruit	2.38	0.38	2.00	2.65	75
Citrus & Olives	2.11	0.38	1.73	2.30	75
Grapes	2.53	0.38	2.15	3.10	70
Rice				6.00	

to 7.1

Pre-irrigation by the application of water to land prior to planting is a beneficial use for these crops in addition to the amounts set forth herein."

R. 837, Judgment 23.

¹³⁶"The Court further finds that any use of water by humans for drinking, bathing, household, household garden uses and for evaporative and refrigerated air conditioning and other domestic uses and for manufacturing and other municipal uses up to an annual average of 339 gallons per person per day, and the use of water without unnecessary waste for drinking or bathing by poultry, cattle and other animals is a beneficial use of either the surface waters of the San Joaquin River or of the underground percolating waters within the Lee Line as more particularly described in Exhibit 3 of these findings."

R. 775, Finding 23.

The Court further decreed the amount of water which could legally be used by Tranquillity Irrigation District, the City of Fresno and other owners of percolating water rights on the alluvial cone of the San Joaquin (Lee's Line, Exhibit II). In fact any parcel of land on the alluvial cone of the San Joaquin known as "Lee's Line." [R. 838-839.]¹³⁷ Therefore, it is submitted that the Court below clearly was in error in its above ruling.

G. The Lower Court Is in Error in Holding That the Defendant Bureau of Reclamation Officials May Condemn or Take by Eminent Domain the Rights of the City of Fresno and Other Plaintiffs Given Them by the County of Origin and Watershed Statutes and Decisions of the State of California.

The District Court held that the City of Fresno, under the California County of Origin and watershed of origin laws was entitled to water to fulfill its municipal and domestic requirements before any water was taken by Respondents out of either the watershed, within which lies the City of Fresno, or the County of Fresno—one of the counties in which the San Joaquin River originates¹³⁸ and in which county the City of Fresno is also located, by means of the Friant-Kern Canal (*Rank v. (Krug) United States*, 142 F. Supp. 1, (1956).)

¹³⁷R. 838-839, Judgment.

¹³⁸* * * The San Joaquin River is a natural watercourse arising in the Sierra-Nevada in Fresno and Madera Counties." *Meridian Ltd. v. San Francisco*, 13 Cal. 2d 424, 429; 90 P. 2d 535, 91 P. 2d 105 (1939).

The District Court further ruled that these priority rights of the City of Fresno were enforceable by *injunction* against the defendant Bureau of Reclamation officials and that if interfered with by the defendant Bureau of Reclamation officials the City of Fresno was not limited to a claim for damages in the United States Court of Claims. (*Rank v. (Krug) United States*, 142 F. Supp. 1 (1956).)

The court below over-ruled the District Court and indicated in its opinion that although the United States had not acquired these rights by either proceedings in condemnation or by seizure under eminent domain that the respondent officials of the United States Bureau of Reclamation could take these rights, either by eminent domain or condemnation upon paying for them. *State v. Rank*, 293 F. 2d 340.

It is submitted that this portion of the opinion of the court below is in error since Congress never authorized such a taking of water under the various Central Valley Projects Acts adopted by Congress and that since Congress had not authorized such a taking the defendant Bureau of Reclamation officials are powerless to take these rights by eminent domain, condemnation proceedings or in any other manner, and that respondent officials are acting in excess of their statutory authority in attempting to do so. Appellant's views on this statement of the law now follows:

1. The Rights of the Defendant Bureau of Reclamation Officials to Take the Water Rights of the City of Fresno and the Other Plaintiffs by Eminent Domain Under the Central Valley Project Are Limited by the Power Expressly Given Them by Congress.

The power of United States Administrative Agencies is limited by the powers expressly given them by Congress.

"Where Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." (Syllabus)

Stark v. Wickhard, Secretary of Agriculture,
321 U. S. 288, 64 S. Ct. 559, 88 L. Ed. 733.
(Syllabus)

- (a) *The Power of Eminent Domain Is Vested Solely in Congress.*

The power of eminent domain is vested solely in Congress.¹³⁹

¹³⁹"The power of eminent domain is vested solely in Congress and the executive has no inherent power in nature of eminent domain." (Syllabus)

"The taking of private property for public use by an officer of the United States, unless authorized, expressly or by necessary implication to do so by some Act of Congress, is no act of Government." (Syllabus)

Youngstown Sheet & Tube Co. v. Sawyer, 103 Fed. Supp. 569, Aff. 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

"* * * Contrary to contention that President had 'inherent' power to be exercised in public interest, the president's power to issue Executive Order directing Secretary of Commerce to take possession of plants of steel companies involved in labor dispute would have to stem either from an act of Congress or from the Constitution itself." (Syllabus)

Youngstown Sheet & Tube Co. v. Sawyer, 103 Fed. Supp. 569, Aff. 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

2. **Congress Never at Any Time Granted the Defendant Bureau of Reclamation Officials the Power to Take Water Needed in California County or Watershed of Origin by Either Condemnation or Eminent Domain, but Expressly Withheld This Power.**

It having been shown that only Congress had the power to grant to the Bureau of Reclamation officials the right to take property for Central Valley Project operations by either eminent domain or condemnation proceedings, it will now be shown that Congress specifically withheld from the Bureau of Reclamation officials the right to take water needed by the county of origin and watershed of origin under the Central Valley Project.

3. **The Acts of Congress Make the Defendant Bureau of Reclamation Officials Subject to California's County of Origin and Watershed Acts.**

The first enactment of Congress governing the operation of the United States Bureau of Reclamation provided that all reclamation projects must be operated in accordance with state law.

"Sec. 8. That nothing in this act shall be construed as affecting or intending to affect or in any way interfere with the laws of any state or territory relating to the control, appropriation, use or destruction of water used in irrigation or any vested right acquired thereunder and the Secretary of the Interior in carrying out the provisions of this Act shall proceed in conformity with such laws."

Act of June 17, 1902 (32 Stats. at L. 388, Chapter 1093) 43 U. S. C. 391.

This court has held that the Acts of June 17, 1902, requires respondent officials building reclamation projects to proceed in conformity with California laws.

"The Bureau of Reclamation does recognize and respect existing water rights which have been initiated and perfected or which are in the state of being perfected under State laws. The Bureau of Reclamation has been required to do so by Section 8 of the Reclamation Act of 1902 ever since the inception of the reclamation program administered by the Bureau of Reclamation. The Bureau of Reclamation has never proposed modification of that requirement of Federal law; and on the contrary, the Bureau of Reclamation and the Secretary of the Interior have consistently, through the 42 years since the 1902 Act, been zealous in maintaining compliance with Section 8 of the 1902 Act. They are proud of the historic fact that the reclamation program includes as one of its basic tenets that the irrigation development in the West by the Federal Government under the Federal Reclamation Laws is carried forward in conformity with State water laws."

United States v. Gerlach Live Stock Co., 339
U. S. 725 at 740, 70 S. Ct. 955 at 963.
Footnotes 14 and 15.

Congress again in 1956 in legislation concerning the *Central Valley Project* readopted the same provisions of the basic reclamation law of 1902.¹⁴⁰

¹⁴⁰"Sec. 4. Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary in carrying out the provisions of this

MOREOVER, CONGRESS SPECIFICALLY BY STATE REQUIRED THE DEFENDANT BUREAU OF RECLAMATION OFFICIALS TO FOLLOW CALIFORNIA'S COUNTY OF ORIGIN AND WATERSHED OF ORIGIN ACTS, both of which expressly prohibit the defendant Bureau of Reclamation officials from taking water needed by either the county of origin or watershed of origin by condemnation eminent domain proceedings.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, * * *.

"* * * the Secretary of the Interior shall make recommendations for the USE OF WATER IN ACCORD WITH STATE WATER LAWS, INCLUDING BUT NOT LIMITED TO SUCH LAWS GIVING PRIORITY TO THE COUNTIES AND AREAS OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (emphasis ours)

Act of Oct. 14, 1949, 63 Stats. 852, 853 (1949).

4. Administrative Interpretation.

Administrative interpretation of a statute is also important. The Bureau of Reclamation has interpreted the congressional acts involving the Central Valley Project as requiring them to leave sufficient water in the

Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided: That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

"Sec. 5. This Act shall be a supplement to the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto).

Act of July 2, 1956, 70 Stat. 483 at 484.

county of origin and watershed of origin to satisfy all of the present and ultimate needs of these two areas and only to take *surplus* waters for exportation out of the county of origin and watershed of origin.

"66. In addition to respecting all existing water rights, *the Bureau* in this report has complied with *California's county of origin legislation*, which requires that water shall be reserved *for the presently unirrigated lands of the areas in which the water originates, to the end that only surplus waters will be exported elsewhere.*" (emphasis ours)

Senate Document 113, 81st Congress, page 65,
Plaintiff's Exhibit 136, R. 2285.

It will be noted that Respondent Bureau officials said "water" would be reserved for the county and watersheds of origin—not damages.

The above is a clear admission that the Bureau itself has and now administratively interprets the Basic Reclamation Act of 1902 to the effect it is bound by California's *County of Origin and Watershed of Origin* Legislation to leave enough water (not money) to meet the needs of the County of Origin and Watershed of Origin and to only take *surplus water* for their reclamation projects from these areas of origin as shown by the last two lines above quoted from Senate Document 113, 81st Congress (R. 2285) which we again quote:

"* * * only surplus water will be exported elsewhere. * * *"

Senate Document 113, 81st Congress, 1st Session, Plaintiffs' Exhibit 136, R. 2285.

5. Congressional Committee Reports.

That the Bureau of Reclamation is prohibited from acquiring water needed by the county of origin and watershed of origin also appears from the latest committee report of Congress dealing with the Central Valley Project, which of course, is a well-recognized aid upon which the courts may rely in interpreting a statute.

"The opinions of the State Attorney General mentioned above declare that both the State and Federal Government in the operation of the CVP are subject to the *restrictions* of the County Origin Law and the Watershed Protection Act." (emphasis ours)

Central Valley Project Documents, 85th Congress, 1st Session, House Document No. 246 at page 516 (1956).

Having shown that Congress intended that the defendant Bureau of Reclamation officials' right to take water by either eminent domain or condemnation proceedings was to be limited by the provisions of the California County of Origin and Watershed of Origin Acts, a specific look at these acts, together with the interpretation placed thereon by the California Legislature in adopting these acts by the Attorney General of the state of California, and the California administrative agencies applying them, also clearly indicates that the Bureau of Reclamation may not condemn or take by eminent domain waters needed by the county of origin and watershed of origin.

6. **The California Constitution and Statutes Are Clear and Definite That No Water Needed by Either the Watershed of Origin or County of Origin May Be Diverted by the Defendant Bureau of Reclamation Officials Out of Said County of Origin or Watershed of Origin.**

Until a few years before the Central Valley Project Act, a riparian owner was entitled to have all of the waters of a stream flow past his riparian land. "In order to make the Central Valley Project possible so that the Government could take surplus waters from the rivers involved in the Central Valley Project, it was necessary to amend the State Constitution of the State of California which was done November 26, 1928.

"The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably for the beneficial use to be served, * * * provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

West's Annotated California Codes, Constitution, Article XIV, para. 3, page 265.

California Legislative Enactments also require that only surplus waters may be exported from the county and watershed of origin.¹⁴¹

7. **Reservation of Water for the Areas in Which It Originates Is the Fundamental Law of California Irrespective of Statute According to the Decisions of the California Supreme Court.**

Irrespective of the acts of the California Legislature it is the basic and fundamental law of California as shown by the decisions of the California Supreme Court that areas in which water originates shall be protected

¹⁴¹"*Prior Right to Watershed Water.* In the construction and operation by the authority of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the authority directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein."

Water Code, Sec. 11460.

"*Exchange of Watershed Water.* In the construction and operation by the authority of any project under the provisions of this part, no exchange of the water of any watershed or area for the water of any other watershed or area may be made by the authority unless the water requirements of the watershed or area in which the exchange is made are first and at all times met and satisfied to the extent that the requirements would have been met were in the exchange, not made, and no right to the use of water shall be gained or lost by reason of any such exchange." (Emphasis ours.)

Water Code, Sec. 11463.

"*Limitations.* The limitations prescribed in Section 11460 and 11463 shall also apply to any agency of the State or Federal Government which shall undertake the construction or operation of the project, or any unit thereof, including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object contemplated by this part. (Added Stats. 1951, c. 1325, p. 3216, Sec. 1.)" (Emphasis ours.)

Water Code, Sec. 11128.

"*Restrictions on release or assignment.* No priority under this part shall be released nor assignment made of any appropriation

from exportation out of the area in which waters originate.

Miller v. Bay Cities Water Co., 157 C. 256, 270, 107 P. 115, 27 L. R. A., N. S. 772 (1910);

Burr v. Maclay Rancho Water Co., 154 C. 428, 436, 98 P. 260 (1908).

"* * * the doctrine of protection of the watershed of origin has been consistently applied by the California Courts in the protection of riparian and overlying rights in recognition of the facts that the natural advantages of a surface or underground water supply was the principal reason for the settlement and development of the counties and watersheds where water originates. *Bathgate v. Irvine*, 1899, 126 Cal. 135, 143, 58 P. 442; *Peabody v. City of Vallejo*, 1935, 2 Cal. 2d 351, 370, 371, 40 P. 2d 486."

Rank v. (Krug) United States, 142 F. Supp. 1 at 150.

8. The Views of Other California Agencies on the Rights of the City of Fresno and Other Landowners in the County of Origin and Watershed of the San Joaquin River.

Although we do not agree with all of the State Water Rights Board of the State of California's decision,¹⁴²

that will, in the judgment of the Department of Finance, deprive the county in which the appropriated water originates of any such water necessary for the development of the county. (Added Stats. 1943, c. 370, p. 1896.)" (emphasis ours)

Water Code, Sec. 10505.

¹⁴²"* * * as a matter of both state and federal law, it appears that the United States, the Bureau of Reclamation as well as its parent organization, the Department of the Interior and the Secretary thereof, are obligated to observe Water Code Sections 11460-11463, in carrying out the Central Valley Project. * * *"

on June 2, 1959, the Board correctly ruled that the defendant Bureau of Reclamation officials were bound to furnish water to the City of Fresno and other land-owners.

In the above decision the United States and all parties in this action were present and although there is a judicial review by California Courts provided for this decision, none of the parties asked for a judicial review.

9. **Opinions of the California Attorney General.**

The Attorney General of the State of California both in his opinions to the State Legislature and in his stand before the trial court took the position that the defendant Bureau of Reclamation officials were powerless to take either by proceedings in condemnation or by seizure under eminent domain under the Central Valley Project the rights of the California landowners given them by the county of origin and watershed of origin protective acts.

"The legislative background of the priority makes it difficult to conceive that the Legislature intended that the authority could destroy the prior-

State Water Rights Board of the State of California Decision No. D-935, Adopted June 2, 1959, p. 100.

"* * * Whatever may have been the intent of the Legislature in adopting these statutes we cannot conclude that it was intended thereby to deprive areas such as the City of Fresno and the Fresno Irrigation District of a source of water supply so readily accessible to them as that obtainable from the San Joaquin River. * * * we believe that the Legislature in adopting 'Watershed Protection' Sections 11460-11463 and 'County of Origin' Sections 10500, 10504 and 10505, was expressing a policy that areas such as the City and the District, both highly developed and well established, located almost at the very outlet-works of Friant Dam should not incur deficiencies in supply such as they are now suffering while water is transported past them to distant undeveloped lands." (emphasis ours)

State Water Rights Board of the State of California, Decision No. D-935, Adopted June 2, 1959, Page 72.

ity be condemnation. Since the priority exists only as against the authority, such a construction would completely destroy the effect of Section 11460 and make its enactment an idle gesture.

* * *

25 Opinions, Attorney General p. 21, (1955)

The Attorney General of California has clearly ruled that the rights of the county and watershed of origin are not subject to condemnation nor taking by eminent domain. The above opinion was given by California Attorney General "Pat" Brown, dated January 5, 1955, in answer to the following two questions referred to him as California Attorney General:

"(2) Under these code sections, would water appropriated for use in areas outside the county where the water originates, or the watershed where the water originates and areas immediately adjacent thereto, be made available later for use in such local areas, if the water became necessary for their development at some time in the future?

"(3) Are Water Code sections 11460 and 11463 applicable to the United States in the construction and operation of the Central Valley Project?"

25 Opinions, Attorney General p. 9, (1955).

to which above questions California's Attorney General gave the answers:

"(2) In the circumstances specified in the statute, Water Code Sections 10505 and 11460 would require that *water* which had been put to use in the operation of the Central Valley Project in areas outside the county of origin, or the watershed of origin and areas immediately adjacent

thereto, be withdrawn from such outside areas and made available for use in the specified area of origin.

"(3) Water Code Sections 11460 and 11463 are applicable to the United States in its operation of the Central Valley Project * * *."

25 Opinions, Attorney General p. 9, (1955).

"VI. Reversion of Water to Areas of Preference When Needed.

"From what has already been said, it follows that the interim use of water reserved for counties of origin under section 10505, or for watersheds of origin under section 11460 and 11463 is subject to termination whenever such water becomes necessary for development of such areas of preference and proper applications to appropriate the water for use therein are filed and granted. In such case *there would be no right of reimbursement for the project works* which had been used for the interim use of the water exported." (emphasis ours)

25 Opinions, Attorney General p. 27, (1955)

If *waters* originating in the county and watershed of origin heretofore taken and used by the United States in the Central Valley Project may be withdrawn to the county and watershed of origin without even paying for portions of the project rendered useless thereby, how can opposing counsel conceivably argue that the government has the right to take these waters by either condemnation proceedings or eminent domain.

10. Determination of the Limits of the Statutory Authority of an Administrative Agency, Is a Judicial Function and Is Not a Matter of Administrative Discretion.

As shown the determination of the limits of the power of defendant Bureau of Reclamation officials of the amount of water they may take from a watershed and county of origin to distant non-riparian lands lying outside of the watershed and county of origin, is a *judicial, not a discretionary administrative decision.*¹⁴³

11. You Can't Drink Damages.

The former mayor of the City, in the District Court pertinently summed up the error of the court below, holding that Respondents, by eminent domain can substitute damages for water which the citizens of Fresno need for drinking and other domestic use when he said "You can't drink damages."¹⁴⁴

12. Conclusion.

In view of Section 8 of the Basic Reclamation Act of June 17, 1902, 32 Stat. 388, in view of the Act of July 2, 1956, 70 Stat. 483, 484 and in view of the Act

¹⁴³"The responsibility of determining limits of statutory authority of administrative agencies is a judicial function." (Syllabus.)

Stark v. Wickhard, Secretary of Agriculture, 321 U. S. 288, 64 S. Ct. 559, 88 L. Ed. 733. (Syllabus)

¹⁴⁴"Q. Mayor, going back to the Attorney General not knowing what we want, did you and I and Mr. Owens hold a meeting with Mr. Goldberg and Mr. Pat Brown in San Francisco?

"A. On Good Friday.

"Q. Good Friday?

"The Court: 1954?

"The Witness: 1954.

"* * *

"A. I remember my answer.

"The Court: What was your answer?

"The Witness: *That you can't drink damages.*" (emphasis ours)

Testimony of Mayor Dunn, Rep. Tr. p. 23,282, lines 10-18; p. 23,284, lines 17-25.

of 1949, 63 Stats. 852, 853 requiring the Secretary of the Interior to give priority to the counties and area of origin,¹⁴⁵ in view of the California Statutes, in view of the administrative determination of the Bureau of Reclamation, and the Acts of Congress heretofore discussed it is respectfully submitted that there are no possible ground for holding that the defendant Bureau of Reclamation officials can come in and take of water badly needed by the City of Fresno for domestic use, having priority over water or irrigation, and distribute it entirely outside of the county and watershed origin by eminent domain or condemnation. As Mayor Dunn said "You can't drink damages".

And as the District Court correctly ruled:

"The City of Fresno does furnish water to its inhabitants for domestic and municipal purposes, by its municipally owned water system.

* * *

"Under the evidence the City of Fresno is in pressing present need of an additional supply of water for domestic and municipal purposes; it is reaching the critical point.

"* * *. It is the conclusion of the Court that it is entitled to a declaratory judgment that its rights for domestic and municipal purposes are superior to any right of the United States to

¹⁴⁵"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * *

"* * * the Secretary of the Interior shall make recommendations for the use of water in accord with state water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future needs." (emphasis ours)

63 Stats. 852, 853 (1949).

divert water beyond the watershed or county of origin, or of the defendant district."

Rank v. (Krug) United States, 142 F. Supp. 184-185.

Finally, the argument that overruling illegal administrative action might cause frictions between the various branches of the Government is without merit, as stated by this Court.

"The doctrine of the separation of powers was adopted by the convention not to promote efficiency but to preclude the exercise of *arbitrary power*."

Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, Aff. 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

H. The Court Below Erred in Relieving the Respondent Districts From the Effect of the Injunction of the Lower Court.

1. **The Basic Reclamation Act of June 17, 1902 Specifically Provided That the Water Under Any Reclamation Project Was Appurtenant to the Lands Served.**

"* * *. That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

Act of June 17, 1902, 32 Stat. 388 at 390 (43 U. S. C. 391).

Under the Central Valley Project legislation Congress in 1956 again re-adopted this feature of the Basic Reclamation Act of 1902.

"* * * that the right to the use of water acquired under the provisions of this Act shall be appurte-

nant to the land irrigated and beneficial use shall be the basis, the measure and the limit of the right."

Act of July 2, 1956, 70 Stat. 483 at 484.

Therefore, whatever water rights, subject of course to the right of original plaintiffs, given the districts legally under the contract between California Regional Director of the Bureau of Reclamation, Boke, and the respondent districts became the property of the landowners *subject to all prior rights of plaintiffs and the City of Fresno* wholly distinct of the property right of the government in the irrigation works, when properly acquired.¹⁴⁶

Therefore, since the respondent districts were the owners of the portion of the rights legally contracted to them, after deducting the water to which the name plaintiffs were entitled to, they were also proper parties as to that part of the waters illegally taken from the plaintiffs.

The Answers of most of the respondent districts, although not claiming they are the legal owners of rights

¹⁴⁶"Section 8 of the Reclamation Act of June 17, 1902, 43 U. S. C. A., pages 382-372, provided: " * * * that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated * * * although the government diverted stored and distributed the water, the contention of the petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made not for the use of the government but under the Reclamation Act for the use of the landowners and by the terms of the law * * * *the water rights became the property of the landowners* wholly distinct from the property right of the government in the irrigation works." (emphasis ours)

State of Nebraska v. State of Wyoming, 325 U. S. 589, 613; 65 S. Ct. 1332, 1349, 89 L. Ed. 1815 (1945);

Ickes v. Fox, 300 U. S. 82, 95, 57 S. Ct. 412, 416; 81 L. Ed. 525 (1937).

under a Reclamation project which have been legally contracted to them, claim they are the equitable owners thereof, and as such were proper parties and properly subject to the injunction of the District Court.¹⁴⁷

"VII. Allege that by virtue of the terms of said assignments the State of California has become and is the trustor or grantor of an express trust; the United States has become and is the trustee of that trust; the landowners to acquire rights to the use of water from the works of the Central Valley Project, including the landowners of defendant districts, have become and are the beneficiaries of that trust; * * *

Excerpt from Answer to Plaintiffs' Complaint as Amended of Defendant Districts, Lindsay-Strathmore Irrigation District, Lindmore Irrigation District, Ivanhoe Irrigation District, Sausalito Irrigation District, Orange Cove Irrigation District, Tulare Irrigation District, Lower Tule River Irrigation District, Stone Corral Irrigation District, Terra Bella Irrigation District, Porterville Irrigation District, Delano-Earlimart Irrigation District and Exeter Irrigation District, filed 10/16/61, R. 158.

The State of California made a similar allegation in their Amended Complaint in Intervention filed August 10, 1951, R. 88, 95.^o They were to be proper parties

¹⁴⁷"II. Answering Paragraph IV of said complaint in intervention, these answering defendants admit the allegations therein contained, save and excepting that defendants allege that the assignments therein set forth were assigned in trust to the United States, all as set forth in Paragraph VII of said Amended Complaint in Intervention."

R. 125, Excerpt from Answer of Southern San Joaquin Municipal Utility District to State of California's Amended Complaint in Intervention, page 2.

and subject to the injunction under the provisions of Section 379, Code of Civil Procedure, State of California.

"Who may be joined as Defendants. Any person may be made a defendant who has or *claims* an interest in the controversy adverse to plaintiff."

Calif. Code of Civil Procedure, 379.

2. All of the Defendant Districts, the Bureau Officials and the State of California, Except the South San Joaquin Municipal Utility District and the Madera Irrigation District, Voluntarily Intervened in This Action and Asked That the Court Make a Decree of Physical Solution, Which Is a Conditional Injunctive Decree.

The Madera Irrigation District, Chowchilla Irrigation District and South San Joaquin Irrigation District later asked the court in the consent decree of August 24, 1951, and consented to a decree of the court¹⁴⁸

¹⁴⁸"The United States is bound by the statements of the attorneys made at a pre-trial conference concerning matters which are properly under consideration by the Court." (Syllabus.)

Daitz Flying Corp. v. United States, 8 Fed. Rules Serv. 16.23 Case 1 (1945).

"When a plaintiff has by his counsel advised the court and defendant of the theories upon which he relies and has given account of these, then the court should not adopt some other theory of recovery even if it should be believed that such a theory was more applicable. The other side has also a right to rely upon the theory stated by the counsel for the plaintiff, and it is entire justice to require the defendant to accept some theory of law propounded by the court for the first time in the opinion. Likewise, the defense in these cases very carefully sets up theories of defense. Here also the same considerations prevail. The defendant should be bound by such theories as well as the plaintiff, and the court should not find some other ground on which to deflect the attack."

Clark v. United States, 13 F.R.D. 342, 345 (D.C. Oregon) (1952).

"It has been held that an issue stated in the pre-trial order is properly tried even though it is not raised in the pleadings."

Moore's Fed. Practice, Vol. 3, page 1128.

ordering a physical solution and counsel for all three of these districts later at either pre-trial conference or other later petitions of this action, requested the court to make a physical solution. These matters are discussed in full under "History of Litigation".

3. Here All of the Defendant Districts Have Asked Affirmative Relief and Counter Claimed and Then Proceeded to Trial. It Is Now Too Late to Ask a Dismissal.

It is submitted under the following authorities that it is too late at this stage of the action for the defendant districts to ask for a dismissal.

"The second sentence of Rule 41(b) provides that after the plaintiff has completed the presentation of his evidence, the defendant may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief * * *. If the motion is denied, the defendant may proceed to offer evidence. *If he does proceed he waives any right to object later that his motion was erroneously denied.*" (emphasis ours)

Moore's Fed. Practice 5, 1041;

Century Indemnity Co. v. Nelson, C. C. A. (9th Cir.), 1936, 90 F. 2d 644.

"Rule 41(c) Dismissal of Counter Claim, Cross Claim, or Third Party Claim. The provisions of this rule apply to the dismissal of any counter claim, cross claim or third party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, *if there is none, before the introduction of evidence at the trial or hearing.*" (emphasis ours)

Moore's Fed. Practice 5, 1049.

4. All of the Defendant Districts Voluntarily Intervened in This Action.

All of the defendant Irrigation Districts voluntarily intervened in the present action. The effect of such a voluntary intervention has been fully discussed in our brief of October 24, 1961.

5. Water Rights Are a Form of Real Property and Interference With the Same Is a Trespass.

"Id. Common Law As To Riparian Rights—Extent And Nature Of Right. By the common law, the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as a part and parcel of it." (Syllabus)

Lux v. Haggin, 69 Cal. 255, 258 (1886).

6. The Defendant Districts, as Joint Trespassers, Were Proper Parties in This Action and Were Properly Joined.

(a) *Because Respondents Claim an Interest in the Controversy.*

"Who may be joined as Defendants. Any person may be made a defendant who has or *claims* an interest in the controversy adverse to plaintiff."

Calif. Code of Civil Procedure 379.

"It is enough if he is found acting in concert with them."

52 Am. Jur. 861.

"The official character of the officer does not justify a trespass *and all who form or participate in*

the trespass are jointly liable with the officer."
(emphasis ours)

48 Cal. Jur. 2d 32;

Lewis v. Johns, 4 C. 629 (1868).

"Where * * * an agent has committed a trespass acting under authority from his principal, they may be jointly or severally sued for damages."

48 Cal. Jur. 2d 31;

Foley v. Martin, 142 C. 256, 75 P. 842 (1904).

(b) *Because They Had an Interest in the Success of Either of the Parties.*

"At any time before trial any person who has an interest in the matter in litigation or in the success of either of the parties * * * may intervene in the action or proceeding." (emphasis ours)

C. C. P. 387.

"The right to intervene is not limited to any particular kind or class of actions but is general * * * to avail himself of the right the applicant must have an interest in the matter of litigation or in the success of one of the parties to the action."

20 Cal. Jur. 517.

(c) *Because They Promoted, Encouraged, Advised, Conspired in, AIDED, ASSISTED, and ABETTED the Commission of the Trespass by the Defendant Bureau of Reclamation Officials.*

"Liability for trespass is not dependent upon personal participation, and one who aids, assists, or advises a trespasser in committing a trespass is equally liable with him who does the act complained of." (Syllabus)

Kirby Lumber Corporation v. Karpel, 233 F. 2d 373 (5th Cir.) (1956).

"31. Co-trespassers—It may be stated as a general rule that all persons who command, instigate, promote, *encourage, advise, countenance, co-operate in, aid, or abet* the commission of a trespass, or who approve it after it is done, if done for their benefit, are co-trespassers with the person committing the trespass and are liable as principals to the same extent and in the same manner as if they had performed the wrongful act themselves." (emphasis ours)

52 Am. Jur. 861.

- (d) *Because Respondents Approved the Illegal Actions of the Defendant Officials Which Were Done for Their Benefit.*

"Co-trespassers * * * all persons * * * who approve of it (a trespass) if it was done for their benefit. * * *"

52 Am. Jur. 861.

- (e) *Because They Ratified the Illegal Acts of the Defendant Bureau of Reclamation Officials "Ratification of Trespass" Is Ground Here.*

"32. Ratification of Trespass—By Ratification or adoption of a trespass committed for one's benefit, a person may, although absent when the trespass was committed, become a principal and liable accordingly, even though the act was not done in obedience to his command or at his request." (emphasis ours)

52 Am. Jur. 862.

By entering into a contract with the defendant Bureau of Reclamation officials after knowledge of the lawsuit, accepting the benefits of the valuable irrigation water, furnishing attorneys and engineers at the trial of the action, and participating in the trial for a period of 18 months, the defendant Districts clearly ratified the illegal actions of the defendant officials and were clearly proper parties in the present action.

(f) *Because the Defendant Districts Encouraged the Defendant Officials' Trespass Against the Plaintiffs.*

"33. Persons Authorizing, Encouraging, or Directing Trespass. Any Person who aids, abets, encourages, or authorizes another in the commission of a trespass, even though not personally present at its commission, is liable equally with him who commits it."

52 Am. Jur. 862.

(g) *The Respondents Authorizing the Doing of an Act of Trespass by Another, or Ordering the Doing of a Trespass, or Advising It, Encouraged, Procured, or Incited the Acts of the Bureau Officials and Were Therefore Liable. The Respondents Need Not Be Present in Order to Be Liable.*

"The person authorizing the doing of an act of trespass by another is liable, whether the authorization is express or implied. * * * advises it, encourages, procures, or incites it, or conspires with the actual doer for the doing of it is liable. * * *"

(emphasis ours)

87 C. J. S. 987.

“* * *. In general, anyone who aids or cooperates with another in the commission of a trespass is liable for it.”

87 C. J. S. 987.

“Liability for trespass is not dependent upon personal participation, and one who aids, assists, or advises a trespasser in committing a trespass is equally liable with him who does the act complained of.” (Syllabus)

Kirby Lumber Corporation v. Karpel, 233 F. 2d 373 (5th Cir.) (1956).

“* * * that liability for trespass is not dependent upon personal participation. One who aids, assists, or advises a trespasser in committing a trespass is equally liable with him who does the act complained of.” (*McDaniel Bros. v. Wilson*, Tex. Civ. App. 70 S. W. 2d 618, 621.)

Kirby Lumber Corporation v. Karpel, 233 F. 2d 373, 375.

(h) *Defendant District Liability Is Not Excused Even Though the Acts of Defendant Bureau Officials Be Considered Those of an Independent Contractor.*

The fact that the defendant Districts had a contract with the defendant Bureau of Reclamation officials does not relieve the Districts; the Districts were still co-trespassers.

“* * * that liability for trespass is not dependent upon personal participation. One who aids, assists, or advises a trespasser in committing a trespass is equally liable with him who does the act complained of.” (*McDaniel Bros. v. Wilson*, Tex. Civ. App., 70 S. W. 2d 618, 621.)

"The rule stated is applicable where the party who cut the timber is an independent contractor. (*Cummer Mfg. Co. v. Copeland, Tex. Civ. App., 35 S. W. 2d 758.*)" (Syllabus) (emphasis ours)

Kirby Lumber Corporation v. Karpel, 233 F. 2d 373, 375 (5th Cir.) (1956).

- (i) *Nor Is It Excused if We Consider the Illegally Acting Bureau Officials as Agents of the Defendant District. Both Are Liable.*

"Where * * * an agent has committed a trespass acting under authority from his principal, they may be jointly or severally sued for damages.

48 Cal. Jur 2d 31.

"In action to enjoin alleged tortious misconduct of officials of government railroad in interfering with plaintiff's business of lightering ships by preventing plaintiffs from using a dock necessary to that business the government was not an indispensable party even though action involved question as to whether the United States or City owned dock since action could conclude nothing against United States."

Berger v. Ohlson, 120 F. 56 (9th Cir.) (1941).

I. To Deny the City of Fresno Water From the Central Valley Project Would Violate Its Rights Under the First and Fifth Amendments to the Constitution of the United States.

As stated Fresno can only pump half of its needs from the underground and even less if the District Court's plan of physical solution is not adopted. The only possible source for a supplemental supply of water is from the Central Valley Project. This is shown from the decision of the District Court in this case.

"(265) Under the evidence the City of Fresno is in pressing present need of an additional supply of water for domestic and municipal purposes; it is reaching the critical point."

"* * *

"The City of Fresno lies in a position of great natural advantage insofar as water is concerned; it is but a short distance from two rivers, the San Joaquin and the Kings, with a combined average annual flow of approximately 3,000,000 acre-feet. And yet, it is now in the anomalous position of being short of water to supply its inhabitants for the highest and best use, with the United States astride both rivers with gigantic dams exporting water to irrigation districts in counties and watersheds other than the San Joaquin and Kings, which water it used not as primary supply, but as a supplemental supply for irrigation and agricultural purposes, declared by California law to be secondary to the highest and best uses of municipalities for domestic purposes."

Rank v. (Krug) United States, 142 F. Supp. 1, 184-185 (1956).

It is submitted that to deny the City of Fresno its needed supply of its highest priority water would in the words of Judge Brandeis, in his dissenting opinion in the *Burleson* case, where a publisher was denied the right to use second class mail, would be a violation of the city's rights given it under the First and Fifth Amendments to the Constitution of the United States.

"A law by which certain publishers were unreasonable or arbitrarily denied the *low rates* would

deprive them of liberty or property without due process of law; and it would likewise deny them the equal protection of the laws.

"* * *. It would be going a long way to say that in the management of the post office the people have no definite rights reserved by the First and Fifth Amendments to the Constitution."

United States v. Burleson, 255 U. S. 407, 41 S. Ct. 325, 65 L. Ed. 704 (1921).

IX.

CONCLUSION.

It is submitted that the maintenance of this suit is to protect the very life and existence of the City of Fresno, the riparian owners between Friant Dam and Gravelly Ford Canal and the underground percolation water supply of 100,000 acres of valuable land, the majority of which lies in the county producing the greatest volume of agricultural products in the world, and that this Court has said no apology need be made for this litigation involving the Central Valley Project of California.

"* * *. There have at times been differences, but these are inevitable in the everyday implementation of such a giant undertaking."

Ivanhoe Irrigation District v. McCracken, 357 U. S. 275, 279-280, 78 S. Ct. 1174, 1178, 2 L. Ed. 2d 1313 (1958).

As to the relief sought we pray as follows:

That this Court reverse the Court below in the matters in which the Court below reversed the District Court in its decisions in *Rank v. (Krug) United States*,

142 F. Supp. 1 (1956) and affirm the decision of the District Court in its entirety in that case; or if this is too broad a prayer we ask this Court to:

1. Affirm the decision of the Court below in all particulars in which it did not reverse the District Court in *Rank v. (Krug) United States*, 142 F. Supp. 1 (1956).

2. Reverse the Court below on the following points:

(a) Reverse the holding of the Court below that respondent Bureau of Reclamation officials can take the riparian and percolating water rights of the landowners between Friant and Gravelly Ford Canal, said reversal to be on the ground that Congress has never authorized a taking of these rights.

(b) Reverse the holding of the Court below that respondent Bureau officials can take either by eminent domain or condemnation the overlying percolating water rights of appellant City of Fresno, said reversal to be on the ground that Congress has never authorized such taking.

(c) Reverse the holding of the Court below that the determination of the statutory limits of authority of respondent Bureau officials is an administrative and not a judicial determination.

(d) Reverse the holding of the Court below that the determination of whether the charge for water to the City of Fresno out of the Central Valley Project is reasonable or unreasonable, arbitrary,

capricious or in excess of their statutory authority is an administrative and not a judicial decision.

(e) Reverse the holding of the Court below that the determination of whether rates charged for water by respondent Bureau official to the City of Fresno in excess of \$3.50 per acre-foot (Class I irrigation water) is unreasonable, arbitrary, capricious and in excess of the authority of respondent Bureau officials in an administrative and not a judicial determination and that such a determination is a suit against the United States.

(f) Reverse the holding of the Court below that the City of Fresno is not entitled as a matter of judicial determination to purchase necessary water out of the Central Valley Project at rates which are not unreasonable, arbitrary, capricious or in excess of the statutory authority of respondent officials to the extent of the needs of the City of Fresno.

(g) Reverse the holding of the Court below that respondent districts should be relieved of the injunction the District Court imposed on the districts and respondent Bureau officials and sustain the holding of the Court below refusing to dismiss the respondent districts as parties herein.

(h) Reverse the holding of the Court below that the United States has not waived its immunity to suit in this action under the Act of July 10, 1952, 66 Stat. 516, and the Reclamation

Act of June 17, 1902, 32 Stat. 388, and other actions of government officials.

(i) Specifically hold that respondent Bureau officials are not authorized by Congress to add a profit to water rates charged cities under reclamation projects in addition to repayment of a proportionate share of construction costs and operation and maintenance costs plus interest at not to exceed $3\frac{1}{2}$ per cent.

(j) Affirm the decision of the District Court in *Rank v. (Krug) United States*, 142 F. Supp. 1 (1956) that any charge to the City of Fresno for water out of the Central Valley Project which has no municipal or domestic priority such as has been offered to the City of Fresno at rates not greater than Class I irrigation rates (\$3.50 per acre-foot) is unreasonable since no point on designation on points on appeal was made by any respondent and since no point was raised by any respondent on this point in any petition for certiorari in this court.

(k) Reverse the Court below and specifically affirm the decision of the District Court in *Rank v. (Krug) United States*, 142 F. Supp. 1 (1956), that the City of Fresno is entitled as a matter of right (in accordance with the California watershed and county of origin statutes and the California domestic and municipal priority statutes which the Respondent officials are required to carry out by

virtue of the basic reclamation law of 1902 and the various acts of Congress governing the Central Valley Project which provide that the project and particularly Friant Dam shall supply the domestic and municipal water needs of the City of Fresno) to water out of the Central Valley Project sufficient to supply its needs. Or this Court should at least hold Fresno entitled to a minimum of 100,000 acre-feet per year of Central Valley Project water which *engineers for respondent officials* were the minimum water requirements of the City of Fresno.

Respectfully submitted,

JOHN H. LAUTEN and
CLAUDE L. ROWE,

*Attorneys for Appellant
City of Fresno.*

Dated: October 20, 1962.

APPENDIX "A".

Opinions of the Court Below.

United States Court of Appeals for the Ninth Circuit
State of California, United States of America, et al.,
Appellants, v. Everett G. Rank, et al., Appellees.

No. 15,840 Aug. 14, 1961.

Before: Hafilin and Merrill, Circuit Judges, and
Powell, District Judge.

Upon petitions for rehearing filed herein by the
State of California, the City of Fresno and the San
Joaquin Municipal Utility District,

IT IS ORDERED:

(1) The opinion heretofore filed herein is corrected
in the following respects:

(a) The following language is stricken from
page 4 of the slipsheet opinion as printed by this
court at the end of the first full paragraph: "The
processing of these applications has been halted
pending the outcome of this case."

(b) The following language is stricken from
the third full subparagraph on page 18 of the
opinion: "The processing of these applications
has been held up pending the outcome of this case."

(c) The following is added to footnote 7, page
19, of the opinion:

Water Code §11463:

"Limitations. The limitations prescribed in Sec-
tion 11460 and 11463 shall also apply to any
agency of the State or Federal Government which
shall undertake the construction or operation of

the project, or any unit thereof, including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object contemplated by this part."

(2) The petition of the City of Fresno is denied.

(3) The petition of the State of California is granted. Briefs shall be filed within the times prescribed by Rule 18 of the Rules of this court, including and opening brief by petitioner unless it elects to stand upon its petition and waive further opening statement.

(4) The petition of San Joaquin Municipal Utility District is granted subject to the same provision with reference to briefs.

(Endorsed) Order on Rehearing Filed Aug. 14, 1961.

Frank H. Schmid, Clerk.

APPENDIX "B".

Constitution of the United States.

"Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

APPENDIX "C".

Acts of Congress.

1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of twenty five cents per acre — to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter, *Provided however* that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the pay-

ment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him. *Provided*, that no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres which shall be in compact form.

SECTION 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated—

SECTION 3. That this act shall only apply to and take effect in the States of California, Oregon and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office.

Act of March 3, 1877, 19 Stat. 377.

“SEC. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the

acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

"* * *"

"SEC. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and *the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws*, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That *the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.*" (Emphasis ours.)

Act of June 17, 1902, 32 Stat. 388 at 390 (43 U. S. C. 391).

"Chap. 1631. An Act Providing for the withdrawal from public entry of lands needed for town-site purposes in connection with irrigation projects under the reclamation Act of June seventeenth, nineteen hundred and two, and for other purposes.

"* * *

"Sec. 4. That the Secretary of the Interior shall, in accordance with the provisions of the reclamation Act, provide for water rights in amount he may deem necessary for the towns established as herein provided, *and may enter into contract with the proper authorities of such towns, and other towns or cities on or in the immediate vicinity of irrigation projects, which shall have a water right from the same source as that of said project for the delivery of such water supply to some convenient point, and for the payment into the reclamation fund of charges for the same to be paid by such towns or cities, which charges shall not be less nor upon terms more favorable than those fixed by the Secretary of the Interior for the irrigation project from which the water is taken.*" (emphasis ours)

Act of April 16, 1906, 34 Stats. 116-117.

"Chap. 86.—An Act For furnishing water supply for miscellaneous purposes in connection with reclamation projects.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the Secretary of the Interior in connection with the operations under the reclamation law is hereby authorized to enter into contract to supply water from any project irrigation system for other

purposes than irrigation, upon such conditions of delivery, use, and payment as he may deem proper: *Provided*, That the approval of such contract by the water users' association or associations shall have first been obtained: *Provided*, That no such contract shall be entered into except upon a showing that there is no other practicable source of water supply for the purpose: *Provided further*, That no water shall be furnished for the uses aforesaid if the delivery of such water shall be detrimental to the water service for such irrigation project, nor to the rights of any prior appropriator: *Provided further*, That the moneys derived from such contracts shall be covered into the reclamation fund and be placed to the credit of the project from which such water is supplied.

Approved, February 25, 1929."

Act of February 25, 1920, 41 Stat., 451-452.

"Chap. 285.—An Act To create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto, and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes.

"* * *

"Sec. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right-acquired therein."

Act of June 10, 1920, 41 Stat. 1063 at 1077.

"Subsec. B. That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States."

Act of December 5, 1924, 43 Stat. 672 at 702.

"CHAP. 42—An Act to provide for the construction of works for the protection and development of the Colorado River Basin, for the approval of the Colorado River compact, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior, subject to the terms of the Colorado River compact hereinafter mentioned, is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water * * *.

"* * *

"Sec. 4 * * *

"(5) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and ~~none~~ shall require the delivery of water, which can not reasonably be applied to domestic and agricultural uses, * * *.

"(b) Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this Act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this Act.

"* * *.

"Sec. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue occurring under the reclamation law and under this Act, will in his judgment cover all

expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

Act of December 21, 1928, 45 Stat. 1057 at 1059-1060.

*"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to provide relief, work relief and to increase employment by providing for useful projects, there is hereby appropriated, out of any money in the treasury not otherwise appropriated, to be used in the discretion and under the direction of the President, to be immediately available and to remain available until June 30, 1937, the sum of \$4,000,000,000 * * **
** * * (b) rural rehabilitation and relief in stricken agricultural areas, and water conservation, trans-mountain water diversion and irrigation and reclamation \$500,000,000; * * * (h) sanitation, prevention of soil erosion, prevention of stream pollution, sea coast erosion, reforestation, forestation, flood control, rivers and harbors and miscellaneous projects, \$350,000,000; * * *"*

Emergency Relief Appropriation Act of 1935,
49 Stat. 115.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following works of improvement

of rivers, harbors, and other waterways are hereby adopted and authorized, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers, in accordance with the plans recommended in the respective reports hereinafter designated and subject to the conditions set forth in such documents; * * *.

“* * *

“Sacramento River, California; Rivers and Harbors Committee Document Numbered 35, Seventy-third Congress; * * *.”

Act of August 30, 1935, 49 Stat. 1028 and 1038.

“Bureau of Reclamation

“* * *

“Central Valley Project, California: For continuation, \$6,900,000, to remain available until June 30, 1937, of which \$6,000,000 shall be available for construction of Friant Reservoir and irrigation facilities therefrom in the San Joaquin Basin and \$250,000 for administrative expenses (including personal services in the District of Columbia and elsewhere), to be available for the same purposes as those specified for projects included in the Interior Department Appropriation Act for the fiscal year 1937 under the caption ‘Bureau of Reclamation’ and to be reimbursable under the Reclamation Law: *Provided*, That not to exceed \$25,000 may be expended for personal services in the District of Columbia.”

Act of June 22, 1936, 49 Stat. 1597 at 1622.

“Sec. 2. That the \$12,000,000 recommended for expenditure for a part of the Central Valley project, California, in accordance with the plans set forth in

Rivers and Harbors Committee Document Numbered 85, Seventy-third Congress, and adopted and authorized by the provisions of section 1 of the Act of August 30, 1935 (49 Stat. 1028 at 1033), entitled 'An Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,' shall, when appropriated, be available for expenditure in accordance with the said plans by the Secretary of the Interior instead of the Secretary of War: *Provided*, That the transfer of authority from the Secretary of War to the Secretary of the Interior shall not render the expenditure of this fund reimbursable under the reclamation law: *Provided further*, That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes: *Provided further*, That, except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project,

and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with state agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law, and may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes: *And provided further*, That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and, third, for power."

Act of August 26, 1937, 50 Stat. 844 at 850.

"(c) The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract, either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of $3\frac{1}{2}$ per centum per annum if the Secretary determines an interest charge to be proper, of an *appropriate share* as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an *appropriate share of the annual operation* and maintenance cost and an *appropriate share of such fixed charges* as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year * * *." (Emphasis ours.)

Act of August 4, 1939, Stat. 1187 at 1194.

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized. * * * .*

"The second proviso in Section 2 of the Act of August 26, 1937 (50 Stat. 844, 850), authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes, is hereby amended to read as follows: *'Provided further, That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized * * *, for construction under the provisions of the Federal reclamation laws of such distribution systems as the Secretary of the Interior deems necessary in connection with lands for which said stored waters are to be delivered. * * * .'*"

Act of October 17, 1940, 54 Stat. 1198 and 1200.

"(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States of such waters for domestic, municipal, stock water shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water irrigation, mining, or industrial purposes.

"* * *

"Sec. 6. That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts."

Act of December 22, 1944, 58 Stat. 887 at 889-890.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Central Valley project, California, authorized by section 2 of the Act of Congress of August 26, 1937 (50 Stat. 850), is hereby reauthorized to include the American River development as hereinafter described, which development is declared to be for the same purposes as described and set forth in the Act of Congress of August 26, 1937 (50 Stat. 850).

"Sec. 2. * * *.

"Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the use of water in accord with State water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future needs."

Act of October 14, 1949, 63 Stat. 852 and 853.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the entire Central Valley project heretofore authorized under the Act of October (should be August) 26, 1937 (50 Stat. 844, 850), and the Act of October 17, 1940 (54 Stat. 1198, 1199), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for construction under the provisions of the Federal reclamation laws of such distribution systems as the Secretary of the Interior deems necessary in connection with lands for which said stored waters are to be delivered, * * *.

"Sec. 2. The features herein authorized shall include an irrigation canal, * * * so as to permit the most effective irrigation of the irrigable lands lying in the vicinity of said canal and supply water for industrial, domestic, and other beneficial uses for these lands in Tehama, Glenn, and Colusa Counties * * *."

Act of September 26, 1950, 64 Stat. 1036.

"Sec. 208. (a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are in-

applicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit."

Act of July 10, 1952, 66 Stat. 516 at 560.

"Sec. 2. The Secretary is hereby authorized to negotiate amendments to existing contracts entered into pursuant to section 9, subsection (e), of the Reclamation Project Act of 1939 to conform said contracts to the provisions of this Act.

"Sec. 3. As used in this Act, the term 'long-term contract' shall mean any contract the term of which is more than ten years.

"Sec. 4. Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

“Sec. 5. This Act shall be a supplement to the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto).

Approved July 2, 1956.”

Act of July 2, 1956, 70 Stat. 483 at 484.

“(d) *Statement of Points.* No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal. As amended Dec. 27, 1946, eff. March 19, 1948.”

Rule 75(d), Federal Rules of Civil Procedure,
(28 U. S. C.)

“(i) *Order as to Original Papers or Exhibits.* Whenever the district court is of opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper.”

— Rule 75(i), Federal Rules of Civil Procedure,
(28 U. S. C.)

APPENDIX "D".

Federal Documents.

"Feasibility Report of 1935"

**The Secretary of the Interior
Washington**

November 26, 1935

**"The President
The White House,**

"My dear Mr. President:

"The Supreme Court of the United States in the Parker Dam decision *United States v. State of Arizona*, 295 U.S. 174, 55 S. Ct. 666, 79 L. Ed. 1371 indicated that Section 4 of the Act of June 25, 1910 (36 Stat. 835), is applicable to irrigation projects constructed under the National Industrial Recovery Act and this report on the Central Valley project, California, is made to you under said statute of 1910 and under subsection B of Section 4 of the Act of December 5, 1924 (43 Stat. 702).

"Section 4 of the Act of June 25, 1910 (36 Stat. 835), provides, in effect, that after the date of that act no irrigation project to be constructed under the Act of June 17, 1902, (32 Stat. 388), and acts amendatory thereof or supplementary thereto, shall have been recommended by the Secretary of the Interior and approved by the direct order of the President.

"Subsection B, Section 4, Act of December 5, 1924 (43 Stat. 702) provides as follows:

"That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water

supply, the engineering features, the cost of construction, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States.'

"GENERAL DESCRIPTION OF PROJECT.

"The Central Valley project embodies a plan for the conservation, regulation, distribution and utilization of the water resources of the Sacramento and San Joaquin rivers to provide urgently needed water supplies for existing agricultural, industrial and municipal developments in the Sacramento and San Joaquin valleys and upper San Francisco Bay region which contain 3,000,000 acres of settled, irrigated and productive land, and a population of 90,000 persons. In addition to providing new water supplies to meet serious problems of water shortage, the project contemplates the restoration of commercial navigation on the upper Sacramento River, increased flood protection for the valley lands, and incidentally the generation of about a billion and a half kilowatt hours annually of hydroelectric energy.

"The key unit of the project is Kenneth Reservoir on the Sacramento River. A dam 420 feet high will regulate floods and store three million acre-feet of water. Water released from the reservoir, after generating hydroelectric power, will flow down the Sacramento River, maintaining adequate depths for navigation and furnishing ample supplies for irrigation and municipal and industrial use along the main river and in the fertile delta region of the Sacramento and San Joaquin Rivers. Intrusion of salt water from the bay into the delta channels—a frequent occurrence in re-

cent years causing substantial loss in crops and threatening destruction of productivity—will be prevented by the released waters. In addition water supplies will be made available in the delta channels for various uses in the nearby upper San Francisco bay area, and for utilization in the San Joaquin Valley. Conduits to carry the supplies to these areas are provided. The supply for the San Joaquin Valley will be conveyed up the San Joaquin River through a series of pumping plants and intervening natural and artificial channels a distance of 150 miles lifting the water to an elevation of 160 feet above sea level. This water will replace San Joaquin River water now used for irrigation in the northern San Joaquin Valley, thus permitting the entire flow of the San Joaquin River to be regulated in Friant Reservoir—the second storage unit of the projects—and to be utilized in the southern San Joaquin Valley where local supplies are deficient. Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve developed irrigated lands in an area extending from Madera County on the north to Kern County on the south.

“The cost of the project, estimated at \$170,000,000, will be met by revenues from the sale of water and power.

“WATER SUPPLY

“The sources of water supply for the project are the Sacramento and San Joaquin Rivers and their tributaries. The State of California, pursuant to acts of the State Legislature has filed notices of appropriation on the principal streams, which are in good standing. Water supplies studies made by the Department of Public Works of California, U. S. War Department

and the U. S. Bureau of Reclamation, indicate on the basis of available data that the works of the project will provide an adequate water supply for all purposes.

"ENGINEERING FEATURES

"The principal engineering features of the project are as follows:

"Kennett Dam Unit—the Kennett reservoir, the key unit of the project, is located in the Sacramento River near Redding in Shasta County. The dam will be 420 feet high and store 3,000,000 acre-feet of water. A 175,000 k.v.a. power plant will be located below the dam. A regulating afterbay with a 50,000 k.v.a. power plant will be constructed below the Kennett Dam. From the power plants a 200 mile power transmission line will extend to a main distributing substation near Antioch or Suisun Bay.

"Contra Costa Conduit—A canal, capacity 120 second feet, with pumping plants, will extend westerly from the San Joaquin delta for 50 miles through Contra Costa County to supply municipal, industrial and agricultural water requirements.

"San Joaquin Pumping System—The works for this pumping station will comprise a dam and other works in Sacramento delta to divert stored water from Kennett reservoir through a channel into San Joaquin delta for salinity control, irrigation and other purposes; dredging of existing channels in the San Joaquin delta; five dams and pumping plants on San Joaquin River to mouth of Merced River; and four pumping plants and 65 miles of canal on the westerly side of San Joaquin Valley which will deliver water to Mendota Weir on San Joaquin River, elevation 160 feet. These works will be capable of furnishing a substituted supply of

1,000,000 acre-feet to 285,000 acres of land now irrigated from San Joaquin River.

"Friant Reservoir—A dam, 250 feet high, will be constructed on San Joaquin River, which will store 400,000 acre-feet of water which will permit the diversion of San Joaquin River water southward at elevation 467 feet. One and one-half million acre-feet annually on the average will be available for transmission from the reservoir through means of the San Joaquin River Pumping System and the purchase of water rights in the San Joaquin River.

"Friant-Kern Canal—The Friant-Kern Canal will extend from Friant Reservoir to Kern River, a distance of 157 miles and will be capable of serving an area of 1,000,000 acres of developed land.

"Madera Canal—The Madera Canal, maximum capacity 1500 second-feet, will extend from Friant reservoir to Chowchilla River, a distance of 35 miles and will be capable of furnishing irrigation water to an area of 140,000 acres.

"ESTIMATED COST OF PROJECT

Kennett dam, reservoir and power plants.....	\$ 84,000,000
Kennett transmission line and substation.....	14,000,000
Contra Costa Conduit.....	2,500,000
San Joaquin Pumping System.....	19,000,000
Friant dam and reservoir.....	14,000,000
Friant-Kern Canal	26,000,000
Madera Canal	3,000,000
Rights of way, water rights and general expenses	8,000,000

TOTAL	\$170,000,000
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"First Year Construction Program.

"Under date of September 10, 1935, you approved an allocation of \$20,000,000 for the Central Valley Project, which amount was later reduced to \$15,000,000. Construction on the following units is recommended for the first year:

"Kenneth Reservoir Unit Contra Costa Conduit"

Friant Dam and Canals.

"An amount of \$15,000,000 can be efficiently and economically expended on the foregoing units during the first year of construction.

"Adaptability of Land for Irrigation,

CROP PRODUCTION AND SETTLEMENT

"The climate is favorable and the soil, if water is available, is adaptable to the production of a wide variety of crops. The principle crops now raised in the San Joaquin Valley are citrus and deciduous fruits, grapes, alfalfa, cotton, nuts and figs; in the Delta, asparagus, celery, potatoes as well as deciduous fruits; and in the Sacramento Valley there is a heavy production of rice in addition to other grains and deciduous fruits.

"The valley is highly developed. The lands are of high value and produce large returns. With an attractive climate, fertile soil and stable markets, water is the one remaining necessity to prosperous, successful agricultural industry. It has been highly successful and supports a large farm population. Much of the fruit is shipped to eastern markets but many other items, such as the products of dairying, are marketed within the state and reduce the quantities imported into the

state. Products are largely non-competitive with other sections of the country, since many of them such as nuts, figs, raisins, asparagus are produced almost wholly in California.

"Transportation facilities are excellent." These include railroads and improved highways leading to the Metropolitan center of Los Angeles and San Francisco and to eastern markets.

"The project is not designed for bringing new lands into cultivation, but for the maintenance of existing agricultural development and existing civilization of a high type. Any increase in irrigated land will be small and will come into being slowly over a long period of time. Part of the water supply is to be obtained by the purchase of water now used for the irrigation of pasture lands and this will result in the retirement from use of 250,000 acres of submarginal land, as compared to a small and gradual increase of irrigated land.

"SOCIAL AND ECONOMIC VALUES.

"The economic values of the project are of great magnitude. The project will not bring into production new agricultural areas but will maintain present values and civilization. Of the 3,000,000 acres now irrigated, 1,000,000 face acute water shortage, and abandonment is proceeding rapidly. The values in jeopardy are large, as without water, not only will lands dry up but communities will vanish and whole sections return to desert, as is now occurring in the San Joaquin Valley. A share of the loss will be suffered by persons not residing in the areas directly affected.

"Control of salinity in the delta of the two rivers near Sacramento is part of the agricultural mainte-

nance phase of the project. Here 400,000 irrigated acres with an annual crop value of \$30,000,000 are menaced by salt water from upper San Francisco Bay. Some abandonment has occurred and the whole area is endangered. In this same general area is a large industrial section which is also short of water by reason of increasing salinity. Here 100 industrial plants produce annually \$100,000,000 value of manufactured products, and while not facing extinction, are suffering damage and expense from lack of water.

"Navigation on the Sacramento River, one of the important waterways of the nation, has been greatly damaged by low water, navigation having been practically abandoned above Sacramento in the summer season. The national navigation and flood values of the project have been found by the War Department to be \$12,000,000, and the recently enacted Rivers and Harbors Bill (Public No. 400, 74th Congress), by reference to the War Department report approves the project and authorizes the appropriation of \$12,000,000 for it.

"A large power house at the main storage dam will produce nearly a billion and a half kilowatt hours of electric energy annually, which will be sold at less than existing rates, thereby benefiting power users and at the same time producing a large revenue, which will go toward the repayment of the construction costs.

"PROBABLE RETURN TO RECLAMATION FUND OF
COST OF CONSTRUCTION.

"The next declaration required is that the cost of construction will probably be returned to the Federal Government. This is interpreted to mean that it will be returned within forty years from the time the Secretary issues public notice that water is available from

the project works. The estimated cost of construction is \$170,000,000 and the annual cost, including repayment of all other charges is \$7,500,000. It is estimated that annual revenues from the sale of water and of electric power will be sufficient to cover these charges. The favorable conditions heretofore recited justify the belief that the project will return its cost.

"I find that the project is feasible from engineering, agricultural and financial standpoints, that it is adaptable for settlement and farm homes, that the estimated construction cost is adequate and that the anticipated revenues will be sufficient to return the cost to the United States.

"The Commissioner of Reclamation has approved and recommended the construction of the project. I therefore recommend the approval of the Central Valley development as a Federal reclamation project.

"Sincerely yours,

"(Sgd.) Harold L. Ickes,

"Secretary of the Interior.

"Approved: Dec. 2, 1935.

"Franklin D. Roosevelt,

"President."

"Letter from the Chief of Engineers, United States Army

"Report of the Board of Engineers for Rivers and Harbors on Review of Reports Heretofore Submitted on Sacramento, San Joaquin, and Kern Rivers, Calif.

Page 2.

"5. Subsequent to the submission of the report therein under review, the State of California has enacted enabling legislation for the construction of the Central Valley Project and for the issuance of bonds in the amount of \$170,000,000 therefor, which embraces the works set forth in the comprehensive plan previously described to include the Kennett Dam on the Sacramento River, with afterbay and with a transmission line leading therefrom to the head of the San Francisco Bay region; a channel or canal with all necessary dams, pumping plants, and lines of conduit to convey a supply of water for irrigation and other benefits and uses up the San Joaquin River; for a storage dam on the San Joaquin River at Friant; and for canals and conduits to distribute the water conserved by the project.

Page 12.

"Central Valley Project.

"* * *

"15. By an act of the State legislature, confirmed by a general election held December 19, 1933, there has been created a State water project authority which is empowered to issue revenue bonds and to construct, operate, and maintain the Central Valley project. The Governor of California, acting in behalf of the State

water project authority has made application to the Public Works Administration for construction of the initial units of the Central Valley project as a non-Federal project under the National Industrial Recovery Act. * * *.

Page 14.

"Conclusions and Recommendations.

"22. There is real need and economic justification for conservation of water resources in the Sacramento-San Joaquin Basin. Under the circumstances it is believed that in order to facilitate prosecution of the Central Valley project by the State of California under the provisions of the National Industrial Recovery Act, the United States would be warranted in approving a 420-foot dam for the Kennett Reservoir and in contributing to the first cost of the reservoir its full value to both flood control and navigation as estimated in the final report under review, or, in round numbers, the sum of \$9,000,000. This contribution to be made directly, and in addition to any grant, based on 30 per cent of the cost of labor and materials, made toward (page 15) construction of the reservoir as a non-Federal project under the Public Works program."

Document No. 35, 73rd Congress, 2d Session.

APPENDIX "E".

1. California Constitution.

Sec. 3. Conservation of water resources; restriction of riparian rights

"Sec. 3. It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is

lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained. (Added Nov. 6, 1928.)”

2. California Water Code Sections.

“State use and control of water. It is hereby declared that the people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection. (Stats. 1943, c. 368, p. 1606, Section 104.)”

California Water Code Section 104

“Highest uses of water; domestic; irrigation. It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation. (Stats. 1943, c. 368, p. 1606, Section 106.)”

California Water Code Section 106

“Policy guiding action on applications. In acting upon applications to appropriate water the department shall be guided by the policy that domestic use is the highest use and irrigation is the next highest use of water. (Stats. 1943, c. 368, p. 1616, Section 1254.)”

California Water Code Section 1254

“Municipal priority. The application for a permit by a municipality for the use of water for the municipality or the inhabitants thereof for domestic purposes shall be considered first in right, irrespective of

whether it is first in time. (Stats. 1943, c. 368, p. 1623, Section 1460.)”

California Water Code Section 1460

“Applications; filing; formalities; priority; diligence. The Department of Finance shall make and file applications for any water which in its judgment is or may be required in the development and completion of the whole or any part of a general or coordinated plan looking toward the development, utilization, or conservation of the water resources of the State.

Any application filed pursuant to this part shall be made and filed pursuant to Part 2 of Division 2 of this code and the rules and regulations of the State Engineer relating to the appropriation of water insofar as applicable thereto.

Applications filed pursuant to this part shall have priority, as of the date of filing, over any application made and filed subsequent thereto. Until October 1, 1959, or such later date as may be prescribed by further legislative enactment, the statutory requirements of said Part 2 of Division 2 relating to diligence shall not apply to applications filed under this part, except as otherwise provided in Section 10504. (Added Stats. 1943, c. 370, p. 1896, as amended Stats. 1953, c. 1522, p. 3184, Section 1; Stats. 1955, c. 1248, p. 2282, Section 1.)”

California Water Code Section 10500

“Release and assignment of priority; assignee defined. The Department of Finance may release from priority or assign any portion of any appropriation filed by it under this part when the release or assignment is for the purpose of development not in conflict with

such general or coordinated plan. The assignee of any such application, whether heretofore or hereafter assigned, is subject to all the requirements of diligence as provided in Part 2 of Division 2 of this code. "Assignee" as used herein includes, but is not limited to, state agencies, commissions and departments, and the United States of America or any of its departments or agencies. (Added Stats. 1943, c. 370, p. 1896, as amended Stats. 1951, c. 445, p. 1458, Section 3, operative October 1, 1951.)"

California Water Code Section 10504

"*Restrictions on release or assignment.* No priority under this part shall be released nor assignment made of any appropriation that will, in the judgment of the Department of Finance, deprive the county in which the appropriated water originates of any such water necessary for the development of the county. (Added Stats. 1943, c. 370, p. 1896.)"

California Water Code Section 10505

"The construction, operation, and maintenance of the project as provided for in this part is in all respects for the welfare and benefit of the people of the State, for the improvement of their prosperity and their living conditions, and the provisions of this part shall therefore be liberally construed to effectuate the purpose and objects thereof. (Added Stats. 1943, c. 370, p. 1896.)"

California Water Code Section 11126

"The authority and the department shall be regarded as performing a governmental function in carrying out the provisions of this part. (Added Stats. 1943, c. 370, p. 1896.)"

California Water Code Section 11127

"Limitations. The limitations prescribed in Section 11460 and 11463 shall also apply to any agency of the State or Federal Government which shall undertake the construction or operation of the project, or any unit thereof, including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object contemplated by this part. (Added Stats. 1951, c. 1325, p. 3216, Section 1.)"

California Water Code Section 11128

"Primary purposes. Shasta Dam shall be constructed and used primarily for the following purposes:

"(a) Improvement of navigation on the Sacramento River to Red Bluff.

"(b) Increasing flood protection in the Sacramento Valley.

"(c) Salinity control in the Sacramento-San Joaquin Delta.

"(d) Storage and stabilization of the water supply of the Sacramento River for irrigation and domestic use. (Added Stats. 1943, c. 370, p. 1896.)" (emphasis ours)

California Water Code Section 11207

"Composition; location. The unit designated as Friant Dam consists of a dam, reservoir, and one or more hydroelectric power plants to be located on the San Joaquin River at or near Friant. (Added Stats. 1943, c. 370, p. 1896.)"

California Water Code Section 11225

"Purposes. Friant Dam shall be constructed and used primarily for improvement of navigation, flood control, and storage and stabilization of the water supply of the San Joaquin River, for irrigation and domestic use, and secondarily for the generation of electric power and other beneficial uses. (Added Stats. 1943, c. 370, p. 1896.)" (emphasis ours)

California Water Code Section 11226

"Prior right to watershed water. In the construction and operation by the authority of any project under the provisions of this part, a watershed or area wherein water originates, or an area immediately adjacent thereto to which can conveniently be supplied with water therefrom, shall not be deprived by the authority directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein. (Added Stats. 1943, c. 370, p. 1896.)"

California Water Code Section 11460

"Exchange of watershed water. In the construction and operation by the authority of any project under the provisions of this part, no exchange of the water of any watershed or area for the water of any other watershed or area may be made by the authority unless the water requirements of the watershed or area in which the exchange is made are first and at all times met and satisfied to the extent that the requirements would have been met were the exchange not made, and no right to the use of water shall be gained or lost by reason of any such exchange. (Added Stats. 1943, c. 370, p. 1896.)"

California Water Code Section 11463

3. California Statutes.

"Sec. 4. Said Central Valley Project as hereby authorized shall consist of the following units:

"(1) Kennett Dam. (Now known as Shasta Dam) A dam, reservoir and hydroelectric power plant, or plants, with necessary afterbay and regulatory appurtenant works located on the Sacramento River, at or near Kennett, Shasta County, California; also a transmission line having capacity sufficient to transmit all the electric energy which can be generated at said dam, including substations, transformer stations, and other facilities for the distribution of power from Kennett Dam to a central substation near the city of Antioch, which transmission line shall be located in such manner and along such route as shall enable the most convenient distribution of electrical energy to the load centers traversed thereby, or capable of service therefrom. Said unit is designated as the Kennett Dam, and shall be constructed and used primarily for improvement of navigation on the Sacramento River to Red Bluff, for increasing flood protection in the Sacramento Valley, for salinity control in the Sacramento-San Joaquin Delta, and for storage and stabilization of the water supply of the Sacramento River *for irrigation and domestic use*, and secondarily for the generation of electric energy and *other beneficial uses*. Said dam shall be built to such height, said reservoir shall have such capacity and said power plant or plants shall be of such capacity as the authority shall determine: pro-

vided, that said reservoir shall have a storage caapacity of not less than two million, nine hundred and forty thousand acre-feet of water." (emphasis ours)

Statutes of California 1933, 50th Session, Chapter 1043, 2643, 2644. (Approved by the Governor August 5, 1933; Initiative vote of the People of the State of California of December 19, 1933; officially declared by the Secretary of State on January 8, 1934; effective January 8, 1934.)

"(4) Friant Dam. A dam, reservoir and hydro-electric power plant, or plants, to be located on the San Joaquin River, at or near Friant, Fresno County, California. San Joaquin River. Said unit is designated as Friant Dam, and shall be constructed and used primarily for improvèment of navigation, flood control, and storage and stabilization of the water supply of the San Joaquin River, for irrigation and domestic use, and secundarily for the generation of electric energy and other beneficial uses. Said dam shall be built to such height, said reservoir shall have such capacity and said power plant, or plants, shall be of such capacity as the authority shall determine; provided, that said reservoir shall have a capacity of not less than four hundred thousand acre-feet of water." (emphasis ours).

Statutes of California, 1933, 50th Session, Chapter 1043, 2643, 2645. (Approved by the Governor August 5, 1933; initiative vote of the People of the State of California of December 19, 1933; officially declared by the Secretary of State on January 8, 1934; effective January 8, 1934.)

"Article 11. Notice of Application.

"712. Issuance of Notice by Board. As soon as practicable after receipt of an application which is complete, a notice relative thereto will be issued by the board and the applicant will be directed to post or publish it as required by law.

"History: 1. Amendment filed 3-10-60; effective thirtieth day thereafter (Register 60, No. 5).

APPENDIX "F".

Statement of Government Officials.

THE FRESNO BEE

Saturday, June 23, 1962

B-A

Reclamation Program Profit Yield Is Noted

COLORADO SPRINGS, Colo.—AP—Reclamation Commissioner Floyd E. Dominy said the government's reclamation program is a profit making enterprise in the returns it brings to the federal treasury.

"To be sure, not all of its profits occur in a form presentable on financial statements," he said in an address at a luncheon of the American Bankers Association.

"There are examples, however, of reclamation projects, in being and under development, which will return significant surpluses to the federal treasury in addition to repayment of all reimbursable costs.

"Perhaps the most significant of these is the Central Valleys Project of California, which at present contemplates surplus revenues of some \$200 million within the payout period of the presently authorized project."

Dominy said for every dollar invested since reclamation projects were started, "92 cents are scheduled for return to the national treasury in direct cash reimbursement.

"Funds invested in power and municipal and industrial water supply functions are returned fully with interest. Those devoted to irrigation development are returned without interest as a matter of long standing federal policy."

NOV 20 1962

JOHN F. DAVIS, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 51

CITY OF FRESNO,

Petitioner,

vs.

STATE OF CALIFORNIA, UNITED STATES
OF AMERICA, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENTS.

THE DELANO-EARLMART, EXETER, IVANHOE, LINDMORE,
LINDSAY-STRATHMORE, LOWER TULE RIVER, MADERA,
ORANGE COVE, PORTERVILLE, SAUCELITO, STONE CORRAL,
TERRA BELLA and TULARE IRRIGATION DISTRICTS; and THE
SOUTHERN SAN JOAQUIN MUNICIPAL UTILITY DISTRICT

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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1962

No. 51

CITY OF FRESNO,

Petitioner,

VS.

STATE OF CALIFORNIA, UNITED STATES
OF AMERICA, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENTS,

THE DELANO-EARLIMART, EXETER, IVANHOE, LINDMORE,
LINDSAY-STRATHMORE, LOWER TULE RIVER, MADERA,
ORANGE COVE, PORTERVILLE, SAUCELITO, STONE CORRAL,
TERRA BELLA and TULARE IRRIGATION DISTRICTS; and THE
SOUTHERN SAN JOAQUIN MUNICIPAL UTILITY DISTRICT

STATUTES INVOLVED

1. Section 9 of the Reclamation Project Act of 1939, 53 Stat. 1195, 43 U.S.C. § 485(h):

(a) "No expenditures for the construction of any new project, new division of a project, or new supplemental works on a project shall be made, nor shall estimates be submitted therefor, by the Secretary until after he has made an investigation thereof and has submitted to the President and to the Congress his report and findings on—

"(1) the engineering feasibility of the proposed construction;

"(2) the estimated cost of the proposed construction;

"(3) the part of the estimated cost which can properly be allocated to irrigation and probably be repaid by the water users;

"(4) the part of the estimated cost which can properly be allocated to power and probably be returned to the United States in net power revenues;

"(5) the part of the estimated cost which can properly be allocated to municipal water supply or other miscellaneous purposes and probably be returned to the United States.

"If the proposed construction is found by the Secretary to have engineering feasibility and if the repayable and returnable allocations to irrigation, power, and municipal water supply or other miscellaneous purposes found by the Secretary to be proper, together with any allocation to flood control or navigation made under subsection (b) of this section, equal the total estimated cost of construction as determined by the Secretary, then the new project, new division of a project, or supplemental works on a project, covered by his

findings, shall be deemed authorized and may be undertaken by the Secretary. . . ."

* * *

(c) "The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of $3\frac{1}{2}$ percentum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 percentum per

annum, and such other fixed charges as the Secretary deems proper: *Provided further*, That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other non-profit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936 and any amendments thereof. Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of water from such project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges shall be in addition and alternative to any authority in existing laws relating to particular projects. *No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.*" Emphasis added.¹

2. Reclamation Act of June 17, 1902, § 7, 32 Stat. 389, 43 U.S.C. § 421:

"That where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation

¹We reprint §9(e) of the Reclamation Project Act of 1939 because, although the City of Fresno included it as a statute involved, Fresno Br. App. 14, the City deleted the very important last sentence. The significance of this sentence is discussed in Part II of the Argument herein.

under judicial process, and to pay from the reclamation funds the sums which may be needed for that purpose. . . ."

STATEMENT OF THE CASE

The City of Fresno is a plaintiff in intervention in the main action, which is described in the briefs for the petitioners in No. 31, pp. 9-14, and No. 115, pp. 13-23. The City filed its motion for leave to intervene on January 4, 1952, 1R. 182-23, shortly before the trial on the merits began. The district court allowed the intervention on May 8, 1953. 1R. 196.

Fresno based its intervention on the assertion "that representation of City of Fresno by existing parties may be inadequate," 1R. 182-9, *i.e.*, it was not satisfied to be represented as a member of the class which the original plaintiffs claimed to represent, cf. 7R. 375-76, 293 F. 2d at 348.² It alleged that the defendant federal officials were illegally diverting the San Joaquin River at Friant for use on lands within the defend-

²Fresno now says that it is one of the named plaintiffs and represents the members of the class. Fresno Br. 47. This statement is not correct. In its complaint in intervention Fresno did not seek to represent a class. The City's complaint contains no allegation of class representation such as that which was added by amendment to the original complaint. 1R. 79-82. When Fresno amended its complaint to attempt to allege a cause of action against the United States, it distinguished the "plaintiffs and the class they represent" from itself. 2R. 517-18. The district court similarly distinguished among the plaintiffs, the members of the class, and Fresno, *e.g.* 3R. 942, found separately as to each, and decreed that the City's right to service from Friant was "subject to the rights, as herein declared, of the plaintiffs and their class." 3R. 10-17.

ant districts, causing the City both present and future damage, 1R. 182-7 to 182-8, because the City needed the "full" or "entire natural flow . . . down the natural channel" or alternatively the plaintiffs' physical solution to supply percolating water through the alluvial cone of the river³ to the City's wells, 1R. 182-4 to 182-6. Fresno also claimed that its rights had not been and could not be taken by eminent domain. 1R. 182-13. Later, Fresno was allowed to amend its complaint to attempt to state a cause of action against the United States. The essence of this cause of action was that there was a controversy between the City and the United States as to whether the actions of the individual defendants were "legal or illegal, lawful or unlawful," and as to the amount of water the City was entitled to divert. 2R. 514-16.³

The district court held that either the full natural flow of the river or the plaintiffs' plan of physical solution was necessary to satisfy Fresno's rights, 3R. 951, 928; that the safe yield of Fresno's wells was 30,000 acre-feet per year, and that the City was exceeding the safe yield by pumping 45,000 acre-feet per year, 3R. 951; and decreed that the defendants, *i.e.*, the United States, its officials, and the districts, had

³Fresno also attempted to state a cause of action based on applications it had filed to appropriate surface water from the river. 1R. 182-14 to 182-21. The district court held that the City had no vested rights enforceable under these applications. 3R. 1018-19. The City did not appeal. The State Water Rights Board later denied the City's applications, but the City did not seek judicial review. Fresno Br. 4-5, 123-24, 147-48. Thus, despite the repeated references to the proceedings on these applications in Fresno's brief, it would seem that this cause of action need no longer be considered. See generally, Annot. 1 L. Ed. 2d 1820 (1957).

no right to divert "water out of the watershed . . . until [the] supplemental water requirements of [the] City of Fresno are met, at the rate per acre foot then charged for what is now known as Class 1 water for irrigation purposes," 3R. 1017-18.

The Court of Appeals reversed the decree "insofar as it relates to the terms upon which the City of Fresno is entitled to receive water from the United States at Friant Dam." 293 F. 2d at 353, 360, 7R. 383, 394. In all other respects the Court of Appeals treated Fresno's case as it did the case of the plaintiffs generally, *i.e.*, dismissed it as to the United States, held that the City's rights were subject to taking either by judicial process or physical seizure, but held that the City's rights had not been taken.

The district court had held that Fresno had two types of rights: (1) its vested rights as an overlying owner;⁴ and (2) a right to preferential treatment in-

⁴In California rights to pump ground water, like rights to divert surface water, are of three types, overlying or riparian, appropriative and prescriptive. The overlying right is a right of a landowner to take a correlative share of the water for reasonable beneficial uses on his overlying land. "The right is based on ownership of land and is appurtenant thereto." The appropriative right is a right based on priority of use to export surplus water to nonoverlying land. Surplus water is that not needed for the reasonable beneficial use of the overlying owners. The prescriptive right is a right of use based on the open and uninterrupted taking of nonsurplus water for the prescriptive period of five years under a claim of right. *Pasadena v. Alhambra*, 33 Cal. 2d 908, 925-27 (1949); *cf.* 293 F. 2d 343-44, 7R. 368.

A city exercises overlying rights only to the extent that it pumps for uses on overlying lands which it owns, such as parks; it is an appropriator or prescriptor to the extent that it pumps water for use by its inhabitants on their lands. *San Bernardino v. Riverside*, 186 Cal. 7, 24-26 (1921). Since Fresno pumps its water into a common distribution system for use throughout the

contracting with the United States. 293 F. 2d at 351-53; 7R. 381-83. The City's argument, in its simplest form, now is:

1. That its rights, of whatever nature, cannot be taken by the United States, *i.e.*, that the Court of Appeals erred when it held:

“While a state can bestow property rights on its citizens which the United States must respect, it cannot take from the United States the power to acquire those rights.” 293 F. 2d at 354, 7R. 383; and

2. That the United States may be enjoined from delivering water outside of Fresno and Madera Counties until it makes water available to Fresno as needed for its domestic and municipal purposes in excess of 30,000 acre feet a year, the safe yield of its wells, at a price not to exceed \$3.50 per acre foot. 3R. 956-57, 1016-18, 1R. 56, par. 13(a).

SUMMARY OF ARGUMENT

The Central Valley Project is, in part, a means of redeveloping water rights so that water can be

city, 3R. 1205-07, does not limit its pumping to uses on its own land or to land overlying the basin, and has been exceeding the safe yield of the basin, *i.e.*, pumping nonsurplus waters, 3R. 951, it has to some extent become an appropriator or prescriptor. That extent was not defined in the decree. *Cf.* 3R. 1003-05. Of course, such definition of the extent of rights of each type is necessary in an adjudication *inter sese*, *Pasadena v. Alhambra*, *supra*, 33 Cal. 2d at 919, but the district court held that this proceeding was not one seeking such an adjudication. 142 F. Supp. 36, 7R. 27; 293 F. 2d at 348, 7R. 375.

redistributed in accordance with the greatest public good. As part of the process of redevelopment, the United States has authority to control and divert the San Joaquin River and to acquire all water rights, including those of the City of Fresno, which are impaired by such control and diversion.

The history of the project, beginning with the earliest plans, and continuing through executive, judicial and congressional examination of the execution of these plans, all show, without exception, that the United States is authorized to acquire all the water rights of whatever description that are necessary for project purposes. Neither the state statutes relative to preferential treatment of various areas and uses, nor the waiver of immunity to suit in § 208 of the Department of Justice Appropriation Act, 1953, limit the authority to acquire water rights. The state statutes are irrelevant. The federal statutes are specific and controlling.

The United States also has authority to sell water to the City and has undertaken to do so. Despite the City's rather flippant argument that one cannot drink damages, there is nothing to show that the United States will do anything but improve the City's water supply. The City's complaint is that it cannot buy as much water as it desires for the price it wishes to pay. Under the controlling federal law, the City has no right to the preferential treatment it demands. To the contrary, irrigation is the primary purpose of federal reclamation projects and contracts to furnish water for municipal and miscellaneous purposes

may be made only if the irrigation efficiency of the project is not impaired.

The present action is not a general adjudication, *inter sese*, defining the rights of all claimants against each other. Section 208 of the Justice Department Appropriation Act, 1953, waived immunity of the United States to suit only in such general adjudications, and therefore the Court of Appeals properly dismissed the United States as a party. Since the districts' only connection with this suit is as contractors with the United States and the United States cannot properly be made a party, the City of Fresno has no right to relief against the districts.

ARGUMENT

I. THE HISTORY OF THE PLANNING AND EXECUTION OF THE CENTRAL VALLEY PROJECT SHOWS THAT THE STATUTORY AUTHORITY TO ACQUIRE WATER RIGHTS IS NOT LIMITED AS CONTENDED BY THE CITY OF FRESNO.

Fresno argues that Congress has not authorized acquisition of its rights. The City claims that the authority to acquire water rights for purposes of the Central Valley Project is limited: (1) to those necessary to provide supplemental rather than new water supplies, Fresno Br. 31, 42; (2) to the taking of "waste" water or water used to irrigate uncontrolled grassland, *id.*, 49-50; (3) by various preferences given by state law to municipal uses and to areas of origin, *id.*, 54-57, 137-53. Although these arguments were persuasive to the district court, they were rejected by the Court of Appeals. 293 F. 2d at 353-54, 7R. 384-85.

The relevant statutes are § 7 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. § 421, p. 4, herein, and § 2 of the Rivers and Harbors Act of 1937, 50 Stat. 850, Fresno Br. App. 12-14. As the Court of Appeals said, "The statutes expressly grant power to acquire such rights as may be required." 293 F. 2d at 354; 7R. 384. Fresno's argument that the statutes do not mean what they say is based on an ambiguous fragment of legislative history. Specifically, the City relies on extracts from the Feasibility Report of December 2, 1935, submitted by the Secretary of the Interior to the President:⁵ "The Central Valley project embodies a plan . . . to provide urgently needed water supplies for existing agricultural, industrial and municipal developments in the Sacramento and San Joaquin valleys. . . ." Fresno Br., 43, App. 21; and "The project is not designed for bringing new lands into cultivation, but for the maintenance of existing agricultural development and existing civilization of a high type." *Id.*, 42 App. 26.

A. The Feasibility Report of 1935 Does Not Support the City's Contentions.

The Feasibility Report does not, however, support Fresno's conclusions that the character or amount of water rights which can be taken for project purposes or the uses to which they may be put are lim-

⁵The Feasibility Report is reprinted in 90 F. Supp. at 823-27, in 1 Engle, Central Valley Project Documents, H. Doc. No. 416, 84th Cong., 2d Sess. 562-67 (1956), and in Appendix D of the city's brief. Fresno Br. App. 20-28. References herein are to that appendix.

ited. In the first place, the report itself contradicts the City's argument. It states:

"This water [imported from the Sacramento to Mendota] will replace San Joaquin River water now used for irrigation in the northern San Joaquin Valley, thus permitting the entire flow of the San Joaquin River to be regulated in Friant Reservoir . . . and to be utilized in the southern San Joaquin Valley where local supplies are deficient." Fresno Br. App. 22.

This shows that all existing uses were not to be left absolutely unimpaired, that some might be curtailed to aid others, and that the entire flow might be taken to the southern San Joaquin Valley where it was needed.

Further the report stated:

"Any increase in irrigated land will be small and will come into being slowly over a long period of time. Part of the water supply is to be obtained by the purchase of water now used for irrigation of pasture lands and this will result in the retirement from use of 250,000 acres of submarginal land, as compared to a small and gradual increase of irrigated land." Fresno Br. App. 26.^a

This statement shows that no representation was made to Congress that the project could be operated

^aThe city contended below that the use of the word *purchase* in this statement precluded resort to eminent domain. 293 F. 2d 354, 7R. 384. In the present context, where the power of eminent domain has been granted by statute, *purchase* is properly construed to cover condemnation. *Hanson Co. v. United States*, 261 U.S. 581, 585-86 (1923); *People v. Superior Court*, 10 Cal. 2d 288, 294-95, 73 P.2d 1221 (1937).

only with surplus or unappropriated water or that the water was to be used only on lands already irrigated.⁷

B. The State's Planning of the Project Shows That No Rights Were to Be Immune From Taking.

But the Feasibility Report is at best a general, minimum statement. 142 F. Supp. at 95, 7R. 121. It is neither necessary nor desirable to rely only on its exegesis to prove that the statutes mean what they say. Actually, the whole history of the project from its first conception shows that the power of eminent domain was to be used to redevelop the waters of the river in accordance with public benefits. *Cf. Berman v. Parker*, 348 U.S. 26, 33 (1954).⁸

⁷Contrary to the City's contentions, Fresno Br. 42-43, it was contemplated that the project would be expanded to serve lands not used at the time of its re-authorization. "It is a great enterprise. Today, it contemplates merely the savings of land which is already in a high state of productivity. In the future, when the demands of that day require it, 10 or 15, 20 or 30 years from now the plan may be extended to include lands which are unused today, but that is only remotely within the contemplation of those who are pleading for this project." 81 Cong. Rec. 6704-05 (1937). (Remarks of Congressman Gearhart on H.R. 7051 which became § 2 of the Rivers and Harbors Act of 1937, the first congressional reauthorization of the project.) The project was expanded to include new lands. H. Doc. No. 416, 80th Cong. 1st Sess. (1947), reproduced in 1 Engle; Central Valley Project Documents, H.R. Doc. No. 416, 84th Cong. 2d Sess. 586, 594 (1956).

⁸The use of the power of eminent domain to redevelop water rights in this reach of the San Joaquin area was recommended at least as early as fifty years ago.

"The Conservation Commission is of the opinion that the State of California could well afford to condemn and, if necessary, pay for riparian rights The result . . . would be the creation of a vast amount of new wealth and greater prosperity for millions of present and future California citizens." Cal. Conservation Commission, Report, 30-31 (1912), reprinted 3 Appendix to Journals of Cal. Senate &

As the City points out, Fresno Br. 36-37, the Central Valley Project was conceived by the State as a state undertaking and was authorized as a federal project because the State was financially unable to execute the plan. The state plan, before federal authorization and reauthorization, demonstrates that Friant Dam was expressly designed by the State and was thereafter constructed by the United States with a view to the time "when *all* the San Joaquin River water would be diverted at high elevations for exportation to the upper San Joaquin Valley," and "the *entire* regulated supply obtained therefrom would be conveyed through the Madera and San Joaquin River-Kern County canals to the areas of deficient local supply on the east side of the upper San Joaquin Valley." Calif. Div. Water Resources, Bulletin No. 29, San Joaquin River Basin, 259, 328 (1931), Ex. Pffs. 86, Ex. Cal. G. Emphasis added. The parallelism between the language in the state report and the federal feasibility report is a striking indication that the state plan is part of the background of interpretation of the federal statutes. See also Fresno Br. App. 29-30.

The above quotations from Bulletin 29 are not idle remarks lifted by chance from an extensive record. They are fully documented and their plain meaning is fortified by other statements, particularly the history

Assembly, 40th Session (1913). "[R]eservoir sites are reported to exist near Friant . . . Unless such storage is undertaken by the controlling riparian owners, under the present conditions the legal difficulties will probably be greater than the engineering ones." *Id.* 211.

of the proposed Friant powerplant and the history of the construction of the project.

The original plans called for a powerplant at Friant to be operated by the water allowed to pass through the dam to meet the needs of the crop lands above the mouth of the Merced River. It was assumed that the construction of what is now the Delta-Mendota Canal would be deferred. Cal. Div. Water Resources, Bulletin No. 25, State Water Plan, 44-45 (1930), Ex. Cal. F. But this was only an interim arrangement, for the waters used to meet the requirements of the crop lands above the mouth of the Merced River were ultimately to be taken for project purposes, as appears from the following. *Id.*, 46-47; see also note to the second table on 49:

"The cost of the Friant reservoir unit includes \$1,500,000 for a 30,000 kilovolt ampere power plant at the dam. This plant would be operated with waters allowed to pass the dam to meet the 'crop land' rights. *It is assumed that at the end of a ten-year period these waters would be diverted for use in the upper San Joaquin Valley and therefore be unavailable for the generation of power in the plant.*" Emphasis added.

When the exchange of Sacramento water for San Joaquin water at Mendota could be accomplished, *i.e.*, after the building of what is now the Delta-Mendota Canal, it was planned that:

"[P]ractically the entire flow of the San Joaquin River would be regulated in Friant Reservoir and would be made available for diversion to and utilization in the upper San Joaquin Valley."

Cal. Div. Water Resources, Bulletin No. 29, San Joaquin Basin, 431 (1931), Ex. Pffs. 86, Ex. Cal. G.

So the matter stood in 1930 and 1931. It is obvious that there were to be wholesale diversions at Friant and little, if any, water passing through the dam.

In 1934 the State applied for a grant from the Federal Public Works Administration to build the project. 90 F.Supp. at 790. The State's application was not granted, but the information therein is of interest to show what there was before the United States to describe the project. This information faithfully repeats what was described above.⁹

⁹ *Amounts and Characteristics of Electric Energy Outputs From Friant Power Plant.*

"In the operation of Friant reservoir, prior to the bringing in of the San Joaquin River pumping system [to bring Sacramento River water to Mendota], it was assumed that the first demand upon the flow of the San Joaquin River would be the supply for the 'Crop Lands' now served from the San Joaquin River in the lower San Joaquin Valley above the mouth of the Merced River in accord with the delivery schedule now in operation. The period studied was the 42-year period 1889-1931. The Friant power plant of 30,000 kilovolt amperes capacity is located at the lower toe of Friant dam for utilizing these 'Crop Land' waters. *This plant is to be abandoned upon completion of the San Joaquin River pumping system, or at such time that practically all the San Joaquin River water would be diverted by the Friant-Kern and Madera canals for exportation to the upper San Joaquin Valley.*" California Water Project Authority Amended Application to Federal Emergency Administration of Public Works for Approval of Central Valley Project of California and for Grant and Loan for its Construction . . . (Jan 25, 1934) 109. Emphasis added.

"When the San Joaquin River Pumping System is constructed and put into operation, practically the entire flow of the San Joaquin River passing Friant will be regulated in and diverted at Friant Reservoir". *Id.* at 125.

C. Judicial Consideration of the Project Shows That No Rights Were to Be Immune From Taking.

The Court of Claims in *Gerlach Live Stock Co. v. United States*, 111 Ct. Cls. 1 (1948), considered in detail the acquisition of water rights for the project. It found no limitation on the authority to acquire:

"32. Prior to December 2, 1935 [the day the President approved the Feasibility Report], the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land non-riparian to the river, situated both to north and south of Friant in the counties of Madera, Merced, Fresno, Tulare, Kings, and Kern, in the State of California.

"Such plan contemplated, among other things, the construction of a dam across the San Joaquin River at Friant, forming a reservoir. It contemplated the construction of two canals, one with a capacity of 1,000 cubic feet per second, referred to later as the Madera Canal, reaching north from the reservoir to the counties of Madera and Merced, and another, with a capacity of 3,500 cubic feet per second, referred to later as the Friant-Kern Canal, reaching south from the reservoir to the counties of Fresno, Tulare, Kings, and Kern. Except for occasional spills to provide reserve storage capacity for the purpose of flood control, the reservoir and canals were planned with capacity to store and divert substantially all the water customarily flowing in the San Joaquin River at Friant. The plan contemplated that *the United States would acquire all existing rights* to the use, diversion, and storage of the waters of the San

Joaquin River flowing at Friant." 111 Ct. Cls. at 27. Emphasis added.

"35. Defendant's plan, as modified, contemplated that the United States should eventually store and divert to nonriparian use *all the waters of the San Joaquin River flowing at Friant*, except for occasional spills. Such spilling was not for the purpose of supplying water to irrigate riparian uncontrolled grasslands, but was contemplated for the purpose of reserving vacant storage space in the reservoirs in the exercise of flood control. Such spilling would not provide an adequate or dependable substitute for the spring floods in the irrigation of riparian noncontrolled grasslands.

"*The plan contemplated that defendant should acquire all existing rights to the use of the water flowing past Friant.* Such rights were of three classes: (1) Use of the water for production of cultivated crops; (2) use of the water for irrigation of controlled grasslands; and (3) the riparian right to the flow of the river, subject to prior rights for the above purposes, for the irrigation of riparian uncontrolled grasslands, watering of livestock, and domestic purposes.

"Defendant's plan contemplated that compensation for the acquisition of the right to the use of water on crop lands would be made by providing a substitute supply of water from the Sacramento River through the pumping system. Pending the construction and completion of the pumping system, the plan contemplated that sufficient water would be released from the Friant Reservoir to meet the requirements of the crop land rights.

"The plan contemplated that the grassland rights and the riparian rights were to be purchased or otherwise acquired by the defendant, and the riparian rights extinguished." 111 Ct. Cls. at 31. Emphasis added.

These holdings were accepted and summarized by this Court:

"A more dramatic feature of the plan is the water storage and irrigation system at the other end of the valley. There the waters of the San Joaquin will be arrested at Friant, where they would take leave of the mountains, and will be diverted north and south through a system of canals and sold to irrigate more than a million acres of land, some as far as 160 miles away. A cost of refreshing this great expanse of semiarid land is that, except for occasional spills, only a dry river bed will cross the plain below the dam. Here, however, surplus waters from the north are utilized, for through a 150-mile canal Sacramento water is to be pumped to the cultivated lands formerly dependent on the San Joaquin." *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 729 (1950).

Obviously, the drying up of the river would not have resulted in compensable takings if the takings were unauthorized by law. *Hooe v. United States*, 218 U.S. 322, 335 (1910); *Larson v. Domestic and Foreign Corp.*, 337 U.S. 682, 703 n. 27 (1949). Equally obvious is the fact that since the Delta-Mendota Canal empties at Mendota, many miles downstream from Friant, there is a reach where substitution of Sacramento water is impossible. It follows that there are

areas where absolute deprivation is authorized, although administratively the Secretary has found it unnecessary to exercise his authority to such an extent.

D. Congressional Consideration of the Project Shows That No Rights Were to Be Immune From Taking

The United States is in the course of executing the ultimate plan of the Central Valley Project.¹⁰ The acquisition of water rights for this purpose has been repeatedly reported to Congress and approved by it.

The Feasibility Report of 1935 stated:

"One and one-half million acre-feet annually on the average will be available for the transmission from the [Friant] reservoir through the means of the San Joaquin Pumping System *and the purchase of water rights in the San Joaquin River.*" 90 F.Supp. at 825. Emphasis added.

In 1947 in a second report, Allocation of Costs and Feasibility Report, H. Doc. No. 146, 80th Cong., 1st Sess. (1947), reproduced in I Engle, Central Valley

¹⁰The original state plan distinguished sharply between the initial development, which could have been supported by the 601,000 acre-feet estimated to be annually available from surplus water and "grass land" rights, Cal. Div. Water Resources, Bulletin 25, State Water Plan 163-64 (1930), Ex. Cal. F, and the 1,720,000 acre-feet necessary for full development, *Id.* 99. Under the ultimate plan, the water necessary to meet "crop land" rights was also to be diverted. *Id.* 45, 46-47. The initial proposal to defer construction of the San Joaquin River pumping system, *id.* 45, now the Delta-Mendota Canal, was soon abandoned. Rivers and Harbors Committee Doc. No. 35, 73d Cong. 2d Sess. 7, 8 (1934), 1 Engle, Central Valley Project Documents, H. Doc. 416, 84th Cong. 2d Sess. 551-52, 553 (1956). Thus, the ultimate development was begun with the inception of the project and it never passed through a relatively static initial phase.

Project Documents (1956), H. Doc. No. 416, 84th Cong., 2d Sess. 574, the Secretary advised Congress that the total cost of the Central Valley Project according to the latest available estimates (as of January 31, 1946) included \$8,457,500 for "water rights and miscellaneous," 1 Engle at 588, par. 14; and that "More than three-fifths of this total represents the cost of acquiring certain water rights (particularly along the San Joaquin River) . . .", *id.* at 590, par. 15(m).

Between 1939 and 1949 in submitting its budget requests the Bureau of Reclamation regularly advised Congress that it was purchasing water rights in the San Joaquin River. The hearings and reports are listed in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 735 n. 9 (1950).

On at least three occasions Congress was advised of the interference by the project with vested water rights between Friant and Mendota and of the program of the Department of the Interior to pay damages for such interference. The first occasion was in 1948 in testimony on the Interior Department Appropriation Bill, 1949, by Mr. Boke, then the regional director of the Bureau of Reclamation in Sacramento and one of the original defendants in this case:

"WATER RIGHTS"

"The next item is 'Water rights, \$332,000.' Tell us about it."

"Mr. Boke. The water rights story in the Central Valley is quite an interesting one and divides into two major phases. One phase is that on the

San Joaquin River where the general story is that through our operation, under our set-up, we are depriving or we are alleged to be depriving in some cases, water users in that area, of their water. The reverse is true on the Sacramento River where we operate Shasta Dam where, instead of our depriving other people of their water, as a water-right problem, the water-right problem is that some of the 280 diverters along the river are taking water which belongs to the United States.

"This item of \$332,000 would be used for both purposes. Part of that \$332,000 would be used to settle the remaining outstanding claims that we have along the San Joaquin River, in an area known as the Friant to Gravelly Ford area. There are about, I believe, 226 users in that area, and we have settled with about 212 of them."

"We have certain payments to make for those water users whose use of the water we have damaged, or are damaging through the operation of the Friant Reservoir and the diversion of the San Joaquin River water down the Friant-Kern canal and out through the Madera canal. Some of this money will be used in settling those cases."

"In addition, we have some 37 suits against us, I believe as a total, in the San Joaquin Valley. A large part of our water-right work, our legal work, and a good deal of technical investigation work also is involved in the protection of the Government in handling those cases." Hearings, Part 3, Subcomm. of the House Comm. on Appropriations. Interior Dept., 80th Cong. 2d Sess., 1967-80 (1948).

The \$323,000 for water rights was part of the total request for "Irrigation Facilities, Friant." Hearings, *supra*, 1213-15. The total budget estimate for Irrigation Facilities, i.e., for both Friant and the Delta, was \$32,154,000. The House reduced this to \$30,080,000, H.R. Rep. No. 2038, 80th Cong. 2d Sess. 24 (1948), with the statement:

"The bill includes a total of \$40,000,400 for this project, which is \$7,185,600 less than the budget estimate. The Committee has set forth in the bill the specific projects for which funds are to be provided.

"The drought which large areas in California have experienced this past winter reemphasizes the necessity for expediting the construction of the irrigation facilities of the C.V.P. To this end the committee has made liberal appropriations for storage and irrigation facilities . . .". *Id.* at 27-28.

Although the amount was reduced, no indication has been found that the money which was appropriated was not to be used for the purposes explained at the hearings. On the other hand, in dealing with the request for power facilities the permissible uses were meticulously discussed, *id.* at 28, and limitations were thereafter incorporated in the Interior Department Appropriation Act, 1949, 62 Stat. 1129.

The Senate simply reduced by 10% the total requested for the Central Valley Project. S. Rep. No. 1609, 80th Cong. 2d Sess., 6, 21 (1948). In conference, a compromise was reached. H.R. Rep. No. 2398, 80th Cong. 2d Sess. 11, 25 (1948). Again, although

the use of the appropriation for power facilities was limited, the appropriation for irrigation facilities, including water rights, was not.

The second occasion when Congress was informed of the water right problem below Friant was in 1949. In the report on the Central Valley Basin, S. Doc. No. 113, 81st Cong., 1st Sess. (1949), Ex. Pffs. 136, the Secretary advised Congress:

"A portion of the water to be stored by Friant Dam and diverted into the Madera and Friant-Kern canals will be available by reason of the purchase of water rights pertaining to certain 'grasslands' which were irrigated from canals and overflows of San Joaquin River during high stages. Since these grasslands are generally of very poor quality, they produce only small yields of low-value crops. By purchase of the water rights, in accordance with State law, the water formerly used on these low-value lands will be made available for diversion to highly productive lands under the Friant-Kern and Madera canals. Practically all of the grassland rights have been purchased. *However, there are a number of other water-right owners along San Joaquin River below Friant Dam which will be affected by the regulation of the river. Investigations of these individual rights and the settlement of justifiable claims for damage due to proposed operation of Millerton Lake are now in progress.*"
Id. at 213. Emphasis added.

The third occasion when Congress was advised about the program of the Department of the Interior for settling the water right problems between Friant

and Gravelly Ford was in 2 Engle, Central Valley Project Documents, H. Doc. No. 246, 85th Cong. 1st Sess. 616 (1957):

“FRIANT-TO-GRAVELLY FORD CONTRACTS

“In the 37-mile reach of the San Joaquin River immediately below Friant Dam and extending to a point below the Gravelly Ford Canal, there are approximately 230 small land holdings with varying requirements of irrigation. Negotiations were conducted with this group of land owners for more than a decade, resulting in 99 water rights adjustment contracts and 17 supplemental contracts. Some of these provide for the construction by Reclamation of minor irrigation facilities, some for the performance of river channel work, and some for cash payments to the land owners. The total amount of water represented is relatively small compared to that involved in the Miller & Lux and other principal contracts. The Friant-to-Gravelly Ford Contracts are tabulated herein on page 618. Several cases went to litigation in the action known as *Rank v. Krug*, which is reported in Chapter XIX, p. 734.”

Congress has continued to make appropriations for construction of the Central Valley Project without limitation on how the funds might be used for water rights. 2 Engle, Central Valley Project Documents, H.R. Doc. No. 246, 85th Cong. 1st Sess. 2-3 (1957). This, of course, is a ratification of the administrative construction that water rights between Friant and Mendota can be taken. *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 293-94 (1958); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 739-40 (1950).

II. THE SECRETARY OF THE INTERIOR HAS ACTED WITHIN HIS STATUTORY DISCRETION IN DETERMINING THE AMOUNTS AND PRICE OF WATER TO BE FURNISHED TO THE CITY OF FRESNO FROM FRIANT DAM UNDER CONTRACT WITH THE UNITED STATES.

The City of Fresno argues that it has a preferential right to receive a total of at least 100,000 acre feet of water a year from Friant Dam at a price no greater than that charged for Class 1 irrigation, i.e., a maximum of \$3.50 per acre foot. Fresno Br. 86, 89. It presently has a contract for 60,000 acre feet a year at the standard municipal rate of \$10.00 per acre foot. Fresno Br. 86; Fresno Pet. for Cert. 38, 7R. 304. The district court held that the City was entitled to such preferential treatment and water rate to satisfy all its needs in excess of the safe yield of its wells. 142 F. Supp. at 184-85, 7R. 270-71; 3R. 956-57, 1016-18.¹¹ The Court of Appeals reversed this aspect of the district court's judgment, 293 F. 2d at 351-53, 7R. 380-383.

The position of the City of Fresno seems to be based on the theory first, that by virtue of § 8 of the Reclamation Act of 1902, Fresno Br. App. 6, the Secretary of the Interior, in delivering water from the Central Valley Project, must comply with Cali-

¹¹The district court actually established 3 categories of ~~priority~~ or preferences in contracting for project water: (1) First priority was given to the named plaintiffs, the members of the class which the named plaintiffs purport to represent, the Tranquillity Irrigation District, the City of Fresno, and all inhabitants and property owners within those areas; (2) Second priority was given to the Chowchilla Water District, and the Madera Irrigation District and all inhabitants and property owners within those areas; and (3) Third priority was given to all other areas as to any water not required for the first two categories. 3R. 1015-16.

California statutes relating to preferential rights of counties and watersheds of origin and to the pre-eminence of domestic above other uses; and second, that these California statutes put the City of Fresno in a preferred position to contract for project water supplies. The City is wrong on both counts.

As to § 8 of the Reclamation Act of 1902, this Court has made it clear that § 8 does not require compliance with state law in the operation of federal reclamation projects. In *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 291-292 (1958) this Court held:

"As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. As the Court said in *Nebraska v. Wyoming*, *supra*, at 615: 'We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system.' Section 5 is a specific and mandatory prerequisite laid down by the Congress as binding in the operation of reclamation projects, providing that '[n]o right to the use of water . . . shall be sold for a tract exceeding one hundred and sixty acres to any one landowner. . . .' We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State."

In the instant case, by § 9(c) of the Reclamation Project Act of 1939, p. 3 herein, Congress has provided a system of regulation respecting contracts and

rates for municipal water supply. Two points about § 9(e) are significant.

First, the last sentence expressly makes use of water for municipal water supply subordinate to irrigation use: "No contract relating to municipal water supply or miscellaneous purposes . . . shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes." Under federal law, therefore, the City of Fresno not only does not have a preferential right to contract for a project water supply, it may only receive water if in the Secretary's judgment irrigation use will not be adversely affected.

Second, § 9(e) delegates broad authority and discretion to the Secretary of the Interior to fix the rates for municipal water service. The rates are to be such "as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper. . . ." The Secretary has exercised this discretion and, pursuant to § 9(a) of the Reclamation Project Act of 1939, p. 2 herein, he notified Congress of the results in the Allocation of Costs and Feasibility Report of February 24, 1947. H. Doc. No. 146, 80th Cong. 1st Sess. (1947). 1 Engle, Central Valley Project Documents (1956), H. Doc. No. 416, 84th Cong., 2nd Sess., 574.

The report assumed a rate of \$10 per acre foot for municipal water, as contrasted with rates in the neighborhood of \$3 per acre foot or less for irrigation

water. *Id.* at 594-96. The report pointed out that the irrigation water rates were based on the farm benefits of the water and the estimated ability of the irrigators to pay over a protracted period. Further it was estimated that during the selected repayment period the revenues from irrigation water would return only \$58,545,475 out of the \$221,551,600 of project capital cost allocated to irrigation. *Id.* at 576-77, 597. By contrast, the report estimated that during the same period the higher municipal water rates would return \$29,667,932 as against the \$9,091,800 of project capital cost allocated to municipal water supply. *Ibid.* The surplus revenues from municipal water supply would be used, together with similar surplus revenues from the sale of project electric energy, to return the portion of the project costs allocated to irrigation but beyond the ability of irrigators to pay. *Id.* at 596, 598.

Since 1947, Congress has, therefore, known that water for municipal use would be sold at higher rates than for irrigation use; that municipal water rates were expected to return a great deal more than the portion of the project cost allocated to municipal water supply; and that these surplus revenues would be applied against the irrigation costs which could not be recovered from the irrigators. Congress has also been informed that this program has been carried out. 2 Engle, Central Valley Project Documents, H. Doc. No. 246, 85th Cong., 1st Sess. 79-84, 261-262 (1957). Long term contracts for irrigation service from Friant Dam provide for rates of \$3.50 per acre foot for Class 1 water and \$1.50 per acre foot for Class 2

water, and contracts for municipal water supply from Friant charge \$10.00 per acre foot. *Id.* 84-101, 272-80.¹² With this knowledge of the manner in which the Secretary has exercised his discretion in fixing water rates, Congress has continued year after year up to the present date to appropriate funds for the Central Valley Project. If there were any doubt as to the legality of the Secretary's rate fixing action, these appropriations constitute clear ratification of his administrative conduct. *Ivanhoe Irr. Dist. v. McCracken*, 257 U.S. 275, 293 (1958); *Fleming v. Mohawk*, 331 U.S. 111, 119 (1947).¹³

Accordingly, federal law alone governs this situation, and under the controlling federal law the City of Fresno can insist neither upon preferential satisfaction of its water needs from the Central Valley Project nor upon the same rate as irrigators.

¹²The City of Fresno argues that the municipal water rates have been miscalculated and will result in the United States making a forbidden profit. Fresno Br. 105-15. We do not recall that this argument has ever been made before in this litigation. Certainly, there is no finding by the district court to support it. The district court's objection to the higher municipal water rate was simply that it was unreasonable to charge cities more than farmers. 3R. 957, 1017-18. The district court agreed with the City that it is entitled to a price described by plaintiffs' witness Smith as "cheaper than your needles and pins." 4R. 1492.

¹³The City of Fresno relies upon section 4 of the Act of April 16, 1906, Fresno Br. App. 7, as an indication of Congressional intent that cities should pay no more for water than farmers. Fresno Br. 43-44, 109-10. Aside from the fact that section 9(c) of the Reclamation Project Act of 1939 probably controls, a simple reading of the 1906 statute reveals that even it does not support the City's position. The 1906 statute plainly placed a floor, not a ceiling, on water rates to cities. The statute was concerned only that such "charges shall not be less nor upon terms more favorable than those fixed by the Secretary of the Interior for the irrigation project from which the water is taken." Emphasis added.

Even if the California county and watershed of origin statutes and the statute denoting domestic use as the highest use of water were relevant, they do not give the City of Fresno the preference it asserts in contracting for water from Friant.

By its own coverage, the county of origin statute, California Water Code § 10505, Fresno Br. App. 34, is completely inapplicable to this situation.¹⁴ Under the watershed of origin statute, California Water Code §§ 11460-11463, Fresno Br. App. 36, the area of preference is stated as being "... a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied water therefrom. . . ." California Water Code § 11460. The entire area of service from Friant Dam, including Kern and Tulare Counties, and not merely Fresno and Madera Counties, is within the watershed

¹⁴California Water Code section 10505 provides that there shall be no assignment or release from priority of an application to appropriate unappropriated water filed by the State that will, in the judgment of the state official or agency making the assignment or release, deprive the county in which the water covered by the application originates of any such water necessary for the development of the county. The only applications filed by the State to appropriate San Joaquin River water were assigned to the United States on September 30, 1939, by the State Department of Finance, with the statement that:

"[S]aid assignment, in the form and substance hereinafter made of the aforesaid applications will not, in the judgment of the State Department of Finance, deprive any county in which such water originates, of any such water necessary for the development of such county. . . ." 1R. 110.

In any event, the county of origin statute could affect only unappropriated water covered by state applications to appropriate assigned to the United States and could not affect water rights acquired by the United States for project purposes by other means, such as purchase, exchange, or the exercise of the power of eminent domain.

of the San Joaquin River.¹⁵ The statute does not give the portion of the watershed which may be closest to the stream a priority over portions which may be more remote from the stream. Moreover, the preference extends beyond the watershed to areas immediately adjacent thereto which can conveniently be supplied therefrom, a description which seems to cover the entire territory served by the Friant-Kern and Madera Canals.

California Water Code §106, Fresno Br. App. 32, declares that the use of water for domestic purposes is the highest use of water and the next highest use is for irrigation. This section has never been construed by the California courts in the context of delivery of developed water supplies, and there is no indication that it was intended to restrict the United States in distributing water from Reclamation proj-

¹⁵The district court's opinion which was expressly made part of the findings of fact, 3R. 862, stated:

"Buena Vista Lake is the sink for the Kern River, and Tulare Lake is the sink for all others, including the San Joaquin in flood time, except the Fresno and Chowchilla rivers, whose contributions of water are minor. In times of extreme flood, the Buena Vista Lake empties north across the floor of the valley to Tulare Lake, and when that reaches a sufficient height, the water flows across the low ridge in the vicinity of Mendota and joins the San Joaquin at the place where it turns in the vicinity of Mendota to flow north after flowing westerly." 142 F. Supp. at 44, 7R. 34.

These are well known facts substantiated by state and federal engineering reports. Cal. State Engineers Report, Part IV, 34 (1880); Cal. Conservation Comm. Report 202 (1912), reprinted 3 Appendix to Journals of Cal. Senate & Assembly, 40th Sess. (1913); Rivers and Harbors Comm. Doc. No. 35, 73rd Cong., 2d Sess. 10 (1937). The district court's declaration that only Fresno and Madera Counties are within the watershed of the San Joaquin River, 3R. 941, 1014, is contrary to these well known facts. As a finding of fact it is contrary to the evidence. As a conclusion of law it depends on a totally unsupported use of the word "watershed". 25 Ops. Cal. Atty. Gen. 8, 19 (1955).

ects or to divest the United States of its rights as a senior appropriator of water to use the water as provided by federal law. 1 Wiel, Water Rights in the Western States 325-27 (3d ed. 1911).

Thus, neither federal nor state law entitles Fresno to demand preferential treatment either as to quantity or price of municipal water service from the project. Whether, in what amounts, and at what rates Fresno or any other municipal water users can be furnished water without impairing the irrigation efficiency and financial integrity of the project, are within the delegated discretion of the Secretary of the Interior.

III. THE COURT OF APPEALS CORRECTLY HELD THAT THE UNITED STATES HAS NOT CONSENTED TO BE SUED AND THAT, WITH THE DISMISSAL OF THE UNITED STATES, THE DISTRICTS SHOULD NOT BE SUBJECT TO THE INJUNCTION.

The district court joined the United States as a defendant on the basis of § 208 of the Department of Justice Appropriations Act, 1953, 66 Stat. 560 (1952), 43 U.S.C. § 666. 142 F. Supp. at 85, 7R. 104; 1R. 336-38. In the district court judgment the injunction was imposed against all the defendants, including not only the United States and the federal officials in charge of the operation of Friant Dam, but also the districts under contract to accept delivery of water from Friant. 3R. 1020-21.

The Court of Appeals reversed the district court and ordered the United States dismissed, 293 F. 2d at 348, 7R. 376, still, however, leaving the districts subject to the injunction. Then, upon rehearing granted on the petition of the districts, the Court of

Appeals agreed with the districts that since they are under contractual obligation to the United States to accept delivery of water, the injunction places them in jeopardy of contempt for complying with their contractual obligations and for acts of the defendant officials over which they have no control, and held that the injunction should be modified so as not to be applicable to the districts. 307 F. 2d at 97, 7R. 401-02.

The City of Fresno contends that the Court of Appeals was in error both in dismissing the United States and in relieving of the districts from the injunction. Fresno Br. 116-37, 153-63.

The Court of Appeals based its conclusion that the United States had not consented to be sued in this action on the ground that in two respects this action does not qualify as one "for the adjudication of rights to the use of water of a river system" within the meaning of 43 U.S.C. § 666: First, all claimants have not been joined, *Miller v. Jennings*, 243 F. 2d 157 (5th Cir. 1957); and second, neither the relief prayed for nor the decree includes the establishment of the rights of the claimants as between themselves. 293 F. 2d at 347, 7R. 374-75.

The City of Fresno makes no serious attempt to dispute that the type of action contemplated by § 666 is one in which all claimants from the particular source are joined and their rights established between themselves. Instead it argues that these requirements were satisfied.

On the question of joinder, the City asserts that all claimants were in effect joined because of the class

nature of the action. Although the City apparently concedes that claimants of appropriative and prescriptive rights cannot speak for other claimants of such rights, it cites a letter from the California Attorney General's Office as constituting an admission that the amount of appropriative and prescriptive claims is *de minimis*. The City reasons that such claims should, therefore, be disregarded in determining whether all claimants were joined. Fresno Br. 125-26.

Even assuming that the requirement of joining all claimants could be satisfied by joining less than all on this *de minimis* theory, the letter from the California Attorney General's Office concerned only appropriative and prescriptive rights to make *surface* diversions from the San Joaquin River. It did not concern claimed rights to river replenishment of underground water pumped from wells. There is nothing in the record to indicate the magnitude of the claimed appropriative and prescriptive rights to pump such underground water. They may very well be quite large. For example, as explained in the Statement of the Case herein, the uses of ground water by the City of Fresno itself are largely appropriative and prescriptive. Under California law, a city or public district may exercise overlying ground water rights only by use on land which it owns, and must rely on appropriative or prescriptive rights in furnishing water to its residents.

On the question whether the rights of all claimants were adjudicated between themselves, the City contends that this was done by the district court's judg-

ment. Such contention is in direct contradiction with the district court's own characterization of this action:

"This is not a suit wherein the plaintiffs seek to establish for each of them their separate rights inter sese to a given quantity of water as between themselves or as against one another, but it is a suit to establish a common right to a common source of water." 142 F. Supp. at 36, 7R. 27-28. Emphasis in original.

"The contention of the defendants as expressed by the Attorney General of the United States, that the interests of the plaintiffs and each of the users within the alluvial cone of the San Joaquin river are adverse to one another and that this cannot be a class action, is without foundation. The argument is to the effect that some plaintiffs take water directly from the river, others both from the river and from wells, and others from the underground only and that some rights may be appropriative or prescriptive, and hence all interests are adverse to one another. The argument confuses the method of taking water with the character of the right sought to be enforced, which is to prevent interference with the common source of supply to all of such uses. . . .

"Where, as here, there is a common source of supply to the owners of all rights, and that common source is invaded or threatened, there is no reason in law or logic why any one or another nature of right cannot stand in judgment for all others, whether riparian, overlying, appropriative, or prescriptive, in a class action to protect that source of supply which is common to all of them. As to the common source and the common act of invasion of that source, their interests

are identical—although as between themselves they may be different in amount, or different in quality, i.e., prescriptive, appropriative, or the like.” 142 F. Supp. at 158-59, 7R. 225-26.

Consistently with the above characterization of the action, the district court did not even attempt to make a comprehensive adjudication of all rights to the particular source as between themselves, and a reading of the district court’s findings, conclusions and judgment bears this out.

The City makes the plea, however, that if all necessary parties have not been joined, the defect be cured by allowing them to be joined at this time. Fresno Br. 128, 134. This would not solve the problem, however. It is not solely the absence of all the claimants which prevents this suit from qualifying as an adjudication of rights to the use of water under § 666. It is the further fact that, despite the change and expansion of the issues as the action unfolded, from the filing of the original complaint to the rendition of the district court judgment, the action was never conceived by anybody as being one for the comprehensive adjudication of all the rights involved. As the district court stated, the suit has always been an attempt to establish “a common right to a common source of water.” 142 F. Supp. at 36, 7R. 27-28. To transform this suit into a true adjudication would mean literally starting all over again, with a new complaint having new allegations and a new prayer. There is no reason why, if this is the desire of the City of Fresno, it should not and cannot do so by filing a new action.

With the dismissal of the United States as a defendant, the Court of Appeals was clearly correct in relieving the districts from the injunction. As explained in Petitioners' Brief in *Delano-Earlimart, et al. v. Rank et al.*, October Term 1962, No. 115, the districts' only relationship to this case is as contractors with the United States for a water supply.¹⁶ The fact that in that capacity they participated in this action in an effort to preserve San Joaquin River water at Friant to satisfy their needs under their contracts, does not answer the question as to the propriety of subjecting them to the injunction.

An injunction against the districts is unnecessary to protect the plaintiffs and could be very prejudicial to the districts. The apparent purpose of the injunction is to safeguard the plaintiffs' asserted rights by maintaining or simulating the natural flow of the San Joaquin River through the operation of Friant Dam or the construction of works in the river channel. Assuming this objective is proper, it can be readily accomplished by enjoining those who are in actual control of Friant Dam. Since the districts neither have nor claim any such control, there is no need to impose the injunction against them. On the other hand, the districts are required by their contracts to accept and pay for water delivered to them. If the injunction were applicable to them, the districts would

¹⁶The contention of the City of Fresno that the districts had contracts "with the defendant Bureau of Reclamation officials", Fresno Br. 162, is obviously erroneous and unsupported by either evidence or findings, as are the contentions that they aided, abetted, encouraged, approved or incited the defendant officials to perform illegal acts. Fresno Br. 159-163.

be faced with the dilemma whether to refuse to receive and pay for water delivered to them and be in violation of their contracts, or take the water in compliance with their contracts and be subject to contempt on the theory that they were aiding in the prohibited storage and diversion of San Joaquin River water.

CONCLUSIONS

For the reasons stated above, we urge that the judgment of the Court of Appeals in the respects attacked by the City of Fresno should be affirmed.

Dated, November 21, 1962.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 51

CITY OF FRESNO, PETITIONER

v.

STATE OF CALIFORNIA, UNITED STATES OF AMERICA,
ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND H. P. DUGAN, EDWIN F.
SULLIVAN, AND JAMES M. INGLES, RESPONDENTS

OPINIONS BELOW

The opinion and supplemental opinion of the district court (R. VII: 22-282, 287-293) are reported *sub nom. Rank v. Krug (United States)* at 142 F. Supp. 1-198. The opinion of the court of appeals, as corrected, and its opinion denying the City of Fresno's petition for rehearing (R. VII: 364-394, 397-400) are reported *sub nom. California v. Rank* at 293 F. 2d 340. Its opinion on rehearing (R. VII: 400) is reported at 307 F. 2d 96.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1961 (R. VII: 395). The City of Fresno's timely petition for rehearing was denied on August 14, 1961 (R. VII: 396). On November 3, 1961, Mr. Justice Douglas extended the time for the City of Fresno to file a petition for a writ of certiorari to December 12, 1961 (R. VII: 404). The petition was filed on December 11, 1961, and was granted on April 2, 1962 (R. VII: 405). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Congress, by consenting to joinder of the United States in suits for general adjudication of all water rights in a river system, waived its sovereign immunity with respect to a suit against it for an order enjoining the operation of a federal reclamation project or directing it to construct certain public works.

2. Whether a suit for a judicial declaration (1) that the plaintiff has water rights superior to those of the United States, and (2) that the plaintiff is entitled to receive water from the United States at a certain price, is a suit against the United States and hence, if not consented to, barred by sovereign immunity.

STATUTES INVOLVED

Section 208(a) of the Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666, provides:

208. (a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that

the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

* * * * *

Section 9(c) of the Reclamation Project Act of August 4, 1939, 53 Stat. 1193, as amended, 43 U.S.C. 485h(c), provides in relevant part:

(c) The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract, either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in

which water is first delivered for the use of the contracting party, with interest not exceeding the rate of $3\frac{1}{2}$ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper * * *. No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judg-

ment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.

STATEMENT

This case arises out of the same litigation as *Dugan v. Rank*, No. 31, this term. As set out more fully in our brief in that case, the suit from which both cases stem was instituted by a number of users of water from the San Joaquin River (1) to enjoin certain local officials of the Bureau of Reclamation (the individual respondents herein)¹ from interfering, by means of the Bureau-administered Central Valley Project, with their water rights, or (2) to obtain a "physical solution" that would provide them with water to meet their needs. Subsequently the United States (over its objection that it was immune from suit) was joined as a necessary party defendant, and petitioner herein, the City of Fresno, intervened as a party plaintiff. The district court entered a decree enjoining the further operation of the Project in such a way as to interfere with plaintiffs' rights, unless a specified "physical solution" should be undertaken by the government. The court of appeals dismissed as to the United States and affirmed as to the officials. It is the officials' petition for review of that ruling that is involved in No. 31.

The present case relates primarily to certain ancillary relief sought by Fresno in connection with its alleged need for an additional water supply for municipal purposes. In its complaint, Fresno requested,

¹The Secretary of the Interior and the Commissioner of the Bureau of Reclamation were also named in the complaint but were not served and did not appear.

in addition to the injunctive relief described above, (1) a declaration that it has water rights which are superior to those of the United States and which must therefore be satisfied before the United States diverts any water from the area, and (2) a declaration that it is entitled to receive Project water from the United States at the same rate charged for water delivered for irrigation purposes (\$3.50 per acre-foot for Class I water and \$1.50 per acre-foot for Class II water²), rather than the rate of up to \$10.00 per acre-foot proposed to be charged for municipal water by the Department of the Interior.

The district court concluded (R. VII: 270) that Fresno "is entitled to a declaratory judgment that its rights for domestic and municipal purposes are superior to any right of the United States to divert water beyond the watershed or county of origin"; and that, while Fresno is "not presently in a position to enforce its rights" because it has not constructed any diversionary or conduit works or reservoirs, "[i]f, as, and when the City of Fresno is in a position to take and receive the water, it will then be sufficient time to enforce that right by an appropriate decree under the provisions of Section 2202 of Title 28, United States Code."³ The court's conclusions of law and judgment provide that, upon constructing the necessary works, Fresno will be entitled to an appropriate injunction

² Class I water is water for which a firm supply is contracted, and Class II water is additional water that is made available (R. VII: 270).

³ This section provides for further relief in Federal Declaratory Judgment Act proceedings.

against the United States (R. III: 956-957, 1014-1017). The district court also concluded (R. VII: 271) that Fresno

is entitled to a declaratory judgment that any charge for water which may be made by the United States should be reasonable. Reasonableness, in light of the facts and the Federal Reclamation Act and the Statutes of California, requires that such charges should be no more than the Irrigation Districts are charged from time to time for Class I water.

The court of appeals set aside the judgment of the district court "insofar as it relates to the terms upon which the City of Fresno is entitled to receive water from the United States at Friant Dam" (R. VII: 394). With respect to Fresno's claim of a right to receive water at a certain rate the court stated (R. VII: 381):

In negotiating and contracting for the delivery of water from Friant Dam, defendant officials were acting within the scope of their statutory authority and were carrying out the duties imposed upon them by their official positions. It is their administrative function to determine the rates at which water shall be delivered. It cannot be said that their statutory authority is limited to the making of such determinations as the courts may find to be reasonable. The complaint of Fresno in this regard is a complaint against the United States and this dispute may not be entertained judicially without a waiver of sovereign immunity on the part of the United States.

With respect to the district court's conclusion that Fresno had water rights superior to those of the United States, the court below found it unnecessary to decide that question because, in any event (R. VII: 383):

Fresno has * * * no vested right to command the services of the United States in receiving its waters. The terms upon which the United States is willing to act in this respect remain an administrative decision which it is within the authority of the defendant officials to make.

In denying Fresno's petition for rehearing, the court elaborated upon the latter holding by stating that, to the extent Fresno claimed rights to the natural flow of the river superior to those of the United States (R. VII: 399):

If and when such rights have been established in accordance with state law, Fresno may be able effectively to protest the impounding of waters by these defendants in contravention of such rights. But this is speculation upon future events and future issues and decision must await the occurrence and the dispute.

However, the court assumed that what Fresno was claiming was a right to Project water. As to that, the court stated (R. VII: 399-400):

If Fresno is to have such water or is to enjoy the benefits of Friant storage or the delivery service of the United States, the terms upon which it may do so are not (for the reasons expressed in our opinion) appropriate issues in

this action against the individual officers of the bureau.*

SUMMARY OF ARGUMENT

I

The United States has not waived its immunity from a suit where, as here, the relief sought is an injunction against the operation of a federal reclamation project or, alternatively, a direction to construct certain public works. Section 8 of the Reclamation Act of 1902 was not such a waiver. The provision of that section that the Secretary of the Interior

*A contract for the provision of Project water to Fresno has recently been executed between the City and the United States. It provides that each year the United States will deliver water from Friant Dam to Fresno at a graduated rate of increase from 5,000 acre-feet the first year to a maximum of 60,000 acre-feet annually at the end of 29 years; each year Fresno is to be advised of the rate of payment for that year, "but in no event shall the rate so announced be in excess of Ten Dollars (\$10) per acre-foot" (para. 3(a)). It also provides:

12. (a) Nothing in this contract shall be construed as affecting the rights of the parties to or concerned in that certain action entitled (*State of California, United States of America, et al., v. Rank, et al.* (No. 15840) now on appeal in the Circuit Court of the United States in and for the Ninth Circuit.

(b) In the event any of the provisions of this contract shall be contrary to any issue as finally decreed in said *State of California, United States of America, et al., v. Rank, et al.*, then this agreement shall be amended to comply with the said final decree: *Provided, however*, That in any event the City shall be entitled to the amount of water specified in Article 3 hereof or such amount as may be decreed in *State of California, United States of America, et al. v. Rank, et al.*, whichever amount is the larger.

shall proceed in conformity with state water-rights law means only that state law defines the property interests that must be acquired if and when the government exercises its paramount power of eminent domain.

Nor did Section 208(a) of the Act of July 10, 1952, constitute such a waiver. Congress there consented to the joinder of the United States in suits "for the adjudication of rights to the use of water of a river system or other source, or * * * for the administration of such rights." As the legislative history of this provision demonstrates, it refers to a quasi-public proceeding, familiar in the law of western States, for the general adjudication of the reciprocal water rights of all claimants in an entire river system.

In enacting Section 208(a), Congress was at pains to disclaim any purpose of allowing it to be used to interfere with the operation of reclamation projects. Furthermore, the present suit is not of the type contemplated by Section 208(a) for the reasons (1) that not all claimants to the water supply involved have been joined, (2) no determination of the rights of each claimant as against each other claimant was sought or granted, and (3) the suit does not embrace an entire river system. Since the United States has not consented to this suit, it is barred by sovereign immunity.

II

Fresno's claims for judicial declarations (1) that it has certain additional water rights superior to those of the United States, and (2) that it is entitled to

receive such water from the United States at a given price, are barred by sovereign immunity. Such declarations of rights as against the United States operate directly against the sovereign; they cannot be prosecuted without its consent.

Fresno's claim of a right to receive water at a given price is based on the fact that the price proposed to be charged for municipal water is higher than that charged irrigators. Such a differential has been expressly authorized by Congress, which provided that municipalities may be charged interest (which irrigators are not) and that they must pay an "appropriate share" of project costs. Moreover, Congress has been kept fully aware of the Secretary of the Interior's policy of charging municipalities higher rates than irrigators. In view of the fact that the prime purpose of the reclamation laws and projects is to promote irrigation, neither the congressional authorization of this differential nor its implementation by the Secretary is unreasonable.

ARGUMENT

I. THE UNITED STATES HAS NOT CONSENTED TO THE CLAIMS FOR RELIEF OF FRESNO AND THE OTHER PLAINTIFFS

Although it also made certain special claims for relief which we discuss later in this brief,⁵ the City of Fresno sought the same relief as that sought by the other plaintiffs in this proceeding and granted by the district court—an injunction against the operation of the federally constructed and maintained Central Valley Project, unless the government should

⁵ See pp. 22-36, *infra*.

undertake a "physical solution" consisting of the construction of specified public works. For the reasons set forth in detail in our brief in *Dugan v. Rank*, No. 31, this claim for relief is barred by sovereign immunity, and the district court was without jurisdiction to entertain it.

Fresno urges, however, that the United States has waived its sovereign immunity, by virtue either of Section 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. 383 (Fresno Br. 122-123), or of Section 208(a) of the Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666 (Fresno Br. 116-121). The court below was clearly correct in holding that neither of these Acts of Congress constituted a consent by the United States to this suit (R. VII: 372, 376; see also R. VII: 385).

There is no basis whatever for inferring a waiver of immunity from Section 8 of the Reclamation Act of 1902, which provides that the Secretary of the Interior "shall proceed in conformity" with state laws relating to "the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder." As this Court held in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 291, that provision means simply that state law defines the property interests that must be acquired if and when the government exercises its paramount power of eminent domain. See Pet. Br., *Dugan v. Rank*, No. 31, p. 26, n. 12; see also R. VII: 385. Nor did any member of this Court suggest the contrary in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, as Fresno

contends (Fresno Br. 122). Both the Court and Mr. Justice Douglas, in his separate opinion, read Section 8 as assuming that the United States had waived its immunity with respect to a suit for *damages* for a taking of state-defined property interests, 339 U.S. at 739, 757, 758, but there is nothing in either opinion in that case to support an assertion that the government waived its immunity from judicial interference with the administration of the Central Valley Project. See *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 703.*

Section 208(a) of the 1952 Act, *supra*, provides in relevant part that

Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of ^{water} of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. * * *

The court of appeals, after detailed consideration, rejected the contention of Fresno and other plaintiffs that this provision constitutes a waiver of sovereign immunity with respect to the present suit. (R. VII: 372-376). Its ruling, we submit, is plainly correct.

Preliminarily we note that this Court has long adhered to the view that it should not "extend the waiver of sovereign immunity more broadly than has

* See p. 14, *infra*.

been directed by the Congress." *United States v. Shaw*, 309 U.S. 495, 502; *Belknap v. Schild*, 161 U.S. 10, 16; *Minnesota v. United States*, 305 U.S. 382, 387. And while the Court suggested in *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, that perhaps sovereign immunity should be given relatively limited scope in relation to suits for damages (337 U.S. at 703-704), it emphasized that

[i]t is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right.

So here, especially where a suit for damages under the Tucker Act was available to plaintiffs (see Pet. Br., *Dugan v. Rank*, No. 31, pp. 9, 31), there is no occasion to broaden the waiver in Section 208(a).

Furthermore, Section 208(a) was not enacted until almost five years after this suit was instituted in 1947, and the government was not brought into the case in alleged pursuance of this provision until 1953, after most of the evidence in the case had been received (see Pet. Br., *Dugan v. Rank*, No. 31, pp. 9, 11). Under the circumstances, we submit that Section 208(a) could not govern this suit. As the Court has pointed out, "Retroactivity, even where permissible, is not favored, except upon the clearest mandate."

Claridge Apartments Co. v. Commissioner, 323 U.S. 141, 164. Where Congress has wished to waive sovereign immunity retroactively, it has done so in no uncertain terms. See Federal Tort Claims Act, 28 U.S.C. 2401. However, neither expressly nor impliedly does Section 208(a) provide for the joinder of the United States in suits instituted before its enactment—let alone in suits in which most of the evidence had already been taken.

The clearest reason for the nonapplicability of Section 208(a) to this case—and the reason on which the court below based its ruling that the United States had not consented to this action—is that Section 208(a) was intended to apply to a wholly different kind of suit. The court of appeals covered the matter succinctly (R. VII: 373):

There can be little doubt as to the type of suit Congress had in mind. It was not a private dispute between certain water users as to their conflicting rights to the use of waters of a stream system; rather, it was the quasi-public proceeding which in the law of western waters is known as a “general adjudication” of a stream system: one in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated.

The most notable characteristics of such a suit, which is an action *sui generis*, are (1) that all known claimants to the water supply involved must be joined, (2) that the rights of each of them as against each of the others must be determined by the final decree, and (3) that it embrace an entire river, stream or

other such system. See, e.g., *Pacific Live Stock Co. v. Oregon Water Board*, 241 U.S. 440, 447-449; *Holbrook Irrigation District v. Fort Lyon Canal Co.*, 84 Colo. 174, 195, 269 Pac. 574, 582; *State ex rel. Hinckley v. Sixth Judicial District Court*, 53 Nev. 343, 352, 1 P. 2d 105, 106; *Hough v. Porter*, 51 Ore. 318, 439, 98 Pac. 1083, 1109; *Spanish Fork West Field Irrigation Co. v. District Court of Salt Lake County*, 99 Utah 527, 536, 104 P. 2d 353, 357; *People of the State of California v. United States*, 235 F. 2d 647, 663 (C.A. 9); *Washington State Sugar Co. v. Sheppard*, 186 Fed. 233, 235-236 (D. Idaho); *In re Silvies River*, 199 Fed. 495, 503 (D. Ore.). See also 2 Wiel, *Water Rights in the Western States* (3d ed.), pp. 1120-1125.

That Section 208(a), in speaking of a suit "for the adjudication of rights to the use of water of a river system or other source," was referring to a very specific and well-known kind of action in western water law is fully confirmed by its legislative history. In explaining the type of suit contemplated by this provision, the Senate Report on the bill (S. 18, 82d Congress) quoted as follows from this Court's decision in *Pacific Live Stock Co. v. Oregon Water Board*, *supra*, 241 U.S. at 447-448:

All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end; First, that the waters may be distributed, under public supervision, among the lawful claimants according

to their respective rights without needless waste or controversy; Second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities and uncertainties; and, Third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.

S. Rep. No. 755, 82d Cong., 1st Sess. 5 (1951). Senator McCarran, the sponsor of the bill and Chairman of the Senate Judiciary Committee, stated that the provision "is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value." Letter to Sen. Magnuson, set forth in S. Rep. No. 755, *supra*, at p. 9.

It is particularly relevant to note that Congress disavowed any purpose of having Section 208(a) used to interfere with the administration of federal projects. Thus, when Senator Magnuson raised the question whether the provision could be used to delay or block a multiple-purpose development such as the then-pending proposed Hells Canyon project on the Snake River, Senator McCarran replied: "S. 18 is not intended to be used for the purpose of obstructing the project of which you speak or any similar

projects * * *." Letter to Sen. Magnuson, *supra*, S. Rep. No. 755 at p. 9. And the Judiciary Committee in its report affirmed its desire "to repudiate any such intent," stating (S. Rep. No. 755, *supra*, at p. 6):

Where reclamation projects have been authorized for the benefit of the water users and the public generally, they should proceed under the law as it exists at the present time and should the Government have reason to need the water of any particular user on a stream, that water should be obtained by condemnation proceedings as is already provided for by law. * * *

The holding of the court below that Section 208(a) is limited to such a general adjudication of rights in a stream system follows the uniform view of the appellate courts that have passed on the provision. In *Miller v. Jennings*, 243 F. 2d 157 (C.A. 5), certiorari denied, 355 U.S. 827, 885, the court affirmed dismissal where, as here, an attempt was made by a suit against Bureau of Reclamation officials to establish claimed priorities as against the Elephant Butte Reclamation project. The same result was reached by the court below in *Nevada v. United States*, 279 F. 2d 699 (C.A. 9), where it affirmed dismissal of a suit for a declaratory judgment that the United States must secure State permission to develop water from wells at a naval installation.

The court below was clearly correct in holding that the present suit was not a "general adjudication" suit such as that contemplated by Section 208(a) (R. VII: 374-376). In the first place, not all of the known claimants to the water supply involved

have been joined in this action (R. VII: 375). While the plaintiffs numbered 14 individuals, one private corporation, one municipal corporation (Fresno) and one public corporation (the Tranquillity Irrigation District) (R. VII: 50), the district court found that "there are many hundreds of owners of property along the river and within the boundary lines of the alluvial cone" (R. VII: 224); indeed, the district court listed more than 200 affected land holdings in its findings (R. III: 900, 914, 919). There is certainly no basis for holding that all of these owners are now bound by the district court's findings.

Fresno attempts to circumvent the absence of these owners by characterizing this suit as a "class action." This argument, which was rejected by the Fifth Circuit in *Miller v. Jennings*, *supra*, 243 F. 2d at 160, was properly rejected by the court below (R. VII: 375). The theory of class action is wholly antithetical to the concept of a "general adjudication" suit, in which "[a]ll claimants are required to appear and prove their claims," *Pacific Live Stock Co. v. Oregon Water Board*, *supra*, 241 U.S. at 447. As the court below pointed out, even if all claimants of riparian and overlying rights could be treated as a class, claimants of appropriative or prescriptive rights could not, for the extent of such rights "must depend upon the circumstances of each individual case" (R. VII: 375); accordingly, as the court found, "[t]he claimants individually must be before the court" (*ibid.*). See, also, 2 Wiel, *Water Rights in the Western States* (3d ed.), p. 1120.

Nor is it any answer to ask the Court, as Fresno does (Fresno Br. 134), *now* to join other parties. Fresno made the same request of the court below, which correctly pointed out that such joinder could not "convert this action into a general adjudication of a stream system" (R. VII: 399). An entirely different kind of case was made on the pleadings and the proof; the joining of additional parties would require a new trial upon new pleadings and new evidence. We submit that it is now entirely too late to remedy the nonjoinder objection to considering this proceeding as a "general adjudication" suit.

The second reason this suit cannot be viewed as one for a general adjudication of rights in a stream system as contemplated by Section 208(a) is that it did not, nor was it designed to, determine the rights of each claimant against each of the others (R. VII: 375-376). The district court recognized as much: "*This is not a suit wherein the plaintiffs seek to establish for each of them their separate rights *inter sese* to a given quantity of water as between themselves or as against one another*" (R. VII: 27; emphasis in original); and, again: "this suit is not a case where the water users, either riparian or overlying, are seeking to enforce any separate or several rights among themselves or against one another, or to have a given amount of water declared and adjudicated to be the right for use on a specified tract of land" (R. VII: 220). Nor did the district court make the slightest attempt to adjudicate the rights of any owner in relation to any other, except to find that Fresno has certain rights "prior and superior to any right of the

United States" (R. III: 1016-1017; see pp. 22-23, *infra*). As the court below pointed out (R. VII: 376), there is not even an adjudication of the rights, as between one another, of the parties who were present and subject to the jurisdiction of the court.

The third reason this case is not a Section 208(a) suit for a general adjudication is that it is concerned, not with "the use of water of a river system or other source," but with the use of water in only one section of the San Joaquin River. The difference is not a technical one. A general adjudication suit must embrace an entire system of water from one source because "by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights" (S. Rep. No. 755, 82d Cong., 1st Sess., p. 5). Nor is it even arguable (Fresno Br. 130) that Friant Dam is an "other source" within the meaning of Section 208(a). The other sources to which a general adjudication suit might relate are such actual sources of water as lakes and swamps; the waters at issue in this case have their source in the San Joaquin system, not in Friant Dam. Moreover, this suit has at all times been concerned with the rights to San Joaquin River water that existed prior to the construction of Friant Dam.

In sum, as the court below held, the United States has not consented to the litigation against it of the claims of Fresno and the other plaintiffs for injunctive relief. Section 8 of the Reclamation Act of 1902 does not constitute such a consent, having no other effect than to leave to state law the definition of the interests the United States must take if it proceeds by

eminent domain. Section 208(a) of the Act of July 10, 1952, is not a waiver of immunity from the present suit, because that provision is concerned only with a suit for the general adjudication of rights to the use of water in a river system; the present case is not such a suit because not all known claimants to the water supply involved have been joined, no determination of the rights of each claimant against the others was sought or made, and the suit does not embrace an entire river system. In the absence of the consent of the United States, these claims are barred by sovereign immunity for the reasons set forth in our brief in *Dugan v. Rank*, No. 31.

II. THE CLAIMS OF FRESNO FOR DECLARATORY RELIEF ARE BARRED BY SOVEREIGN IMMUNITY

In addition to the claims Fresno made in common with the other plaintiffs in this proceeding (and which are discussed in our brief in *Dugan v. Rank*, No. 31, and at pp. 11-22, *supra*), it also sought, and was granted by the district court, judicial declarations (1) that it had certain additional water rights superior to those of the United States, and (2) that it was entitled to contract for water from the Central Valley Project at a certain price. The court of appeals properly held that these claims for relief were barred by sovereign immunity (R. VII: 381, 382; see also R. VII: 399-400).

A. THE CLAIM FOR A DECLARATION OF SUPERIOR WATER RIGHTS

By an amendment to its complaint, filed in August 1954, Fresno sought a declaratory judgment settling

its water rights as against the United States (R. II: 505-520). The district court, in its final judgment, declared that "the rights of the City of Fresno to secure surface water for domestic and municipal purposes from the San Joaquin River," over and above the rights it has in common with the other plaintiffs, "are prior and superior to any right of the United States * * * to divert and take any water of the San Joaquin River, or store the same for diversion, by means of Friant Dam, or Friant-Kern canal, or otherwise, out of the Counties of Fresno and/or Madera, and/or out of the watershed or area wherein the water of the San Joaquin River originates" (R. III: 1016-1017). The court of appeals held that, since the United States had not consented to this suit (R. VII: 376) and since the conduct of its officials in relation to Fresno's claim for additional water had been within their authority (R. VII: 383), the claim was barred by sovereign immunity (see also R. VII: 399-400).⁷ This ruling was correct.

⁷ This ruling assumed, with reason, that Fresno claimed a right to water from the Central Valley Project (R. VII: 399). The court also ruled that, if Fresno's claim was rather to water from the natural flow of the San Joaquin, that claim was premature, since Fresno had not perfected such rights in accordance with the procedures established by state law (R. VII: 399). In so ruling, the court was following the settled doctrine that the declaratory judgment procedure "may not be made the medium for securing an advisory opinion in a controversy which has not arisen" (*Coffman v. Breeze Corps.*, 323 U.S. 316, 324).

The relief sought and granted would operate directly upon the United States. In *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 689, n. 9, this Court noted that the plaintiff there had sought declaratory relief as to the validity of a sale to which it and the United States were parties. The Court observed that the request for such relief was "even more clearly directed at the sovereign" than the injunctive relief there sought, and it concluded that "[s]uch a declaration of the rights of the respondent *vis-à-vis* the United States would clearly have been beyond the court's jurisdiction" (*ibid.*). See also *Ogden River Water Users' Ass'n. v. Weber Basin Water Conservancy*, 238 F. 2d 936 (C.A. 10); *Hudspeth County Conserv. & Recl. Dist. No. 1 v. Robbins*, 213 F. 2d 425, 432 (C.A. 5). So here, where a declaration of Fresno's water rights as against the United States was both sought and granted, the suit was for relief against the sovereign and was barred by the sovereign's immunity.

The district court also ruled that "upon the City of Fresno constructing the necessary transportation works to bring such supplemental supply of surface water of the San Joaquin River to said City of Fresno," it "will be entitled to an injunction restraining and enjoining" the United States (and the other defendants) "from diverting, or storing for diversion, by means of Friant Dam, or the Friant-Kern canal, or otherwise, any San Joaquin River water out of the watershed and the Counties of Fresno and/or Madera, or out of the area wherein the water of the San Joa-

quin River originates, until said supplemental water requirements of said City of Fresno are met * * * (R. III: 1017-1018). Like the injunctive branch of the relief sought by and granted to all of the plaintiffs (see Pet. Br., *Dugan v. Rank*, No. 31, pp. 19-20), such a decree would obviously operate directly against the United States and interfere with its administration of a federal reclamation project. Such relief is plainly beyond the power of the court to grant as against the unconsenting sovereign. See *Larson v. Domestic & Foreign Corp.*, *supra*, 337 U.S. at 704; *Land v. Dollar*, 330 U.S. 731, 738.

Nor can the United States be said to have consented to the prosecution of Fresno's claim for declaratory relief by virtue of Section 208(a) of the Act of July 10, 1952, discussed at pp. 13-21, *supra*. Fresno's claim was by no stretch of the imagination a quasi-public suit for a general adjudication of water rights in a river system, such as Section 208(a) contemplates; Fresno sought nothing more, and the district court granted it nothing more, than a narrow declaration of its own rights as against those of one other claimant, the United States. As with the claims of all of the plaintiffs, this claim of Fresno's fell short of a Section 208(a) suit by (1) the absence of known claimants, (2) the lack of a determination of all the claimants' rights as among one another, and (3) the failure to embrace more than a limited stretch of a river. Accordingly, there is no basis for finding any such consent on the part of the sovereign as would waive its immunity from suit.

Since Fresno's claim is plainly barred by sovereign immunity, there is no occasion to inquire into the merits of the City's contention that it has water rights superior to those of the United States, and it was for that reason that the court below expressly declined to rule on Fresno's claim (R. VII: 383). There is another, even more cogent, reason for not inquiring into the merits of that claim—namely, that, whatever Fresno's rights may be, they are clearly subordinate to the federal power of eminent domain. As we have pointed out (see Pet. Br., *Dugan v. Rank*, No. 31, pp. 32, 42–46; see also pp. 12–13, *supra*), not only did the court below sustain the government's comprehensive power to take whatever water rights it needed for the Central Valley Project (R. VII: 384–387), but this Court has made it clear that the only restrictions on that power are that the government must respect state definitions of property taken and that it must pay just compensation therefor. See *Ivanhoe Irrigation District v. McCracken*, 339 U.S. 275, 291; *United States v. Gerlach Live Stock Co.*, 339 U.S. 725.* Thus, if any legitimate rights

* Fresno argues that the Act of Oct. 14, 1949, 63 Stat. 852, 853, which calls upon the Secretary of the Interior to "make recommendations [to Congress] for the use of water in accord with State water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future needs," limits the federal power of eminent domain (Fresno Br. 142). It is clear from the context of this provision (which was adopted at the suggestion of the Bureau of Reclamation, *Hearings, American River Basin Project, House Subcommittee on Irrigation and Reclamation*, 81st Cong., 1st Sess., pp. 35–36) that it refers to projects thereafter undertaken, not those already operative, such as the portion of the

of Fresno, as established in consonance with state law, have been or may in the future be interfered with by the federal government's operation of the Project, the City's remedy is a Tucker Act suit. The availability of that remedy provides Fresno with all of the constitutional protection to which it is entitled. *Hurley v. Kincaid*, 285 U.S. 95, 104; *Berman v. Parker*, 348 U.S. 26; see also Pet. Br., *Dugan v. Rank*, No. 31, p. 31.

B. THE CLAIM FOR A DECLARATION OF A RIGHT TO WATER AT A CERTAIN PRICE

Fresno also sought a judicial declaration that it was entitled to receive water from the Central Valley Project at the same price as that charged for irrigation water, rather than at the higher rate the Department of the Interior proposed to charge for water for domestic and municipal purposes. Pursuant to this request, the district court concluded that Fresno was entitled to a declaratory judgment that "any charge for water which may be made by the United States should be reasonable" and that "[r]easonableness, in light of the facts and the Federal Reclamation Act and the Statutes of California, requires that such charges should be no more than the Irrigation Districts are charged from time to time for Class I water" (R. VII: 271). The court below held that since the respondent officials were acting within their

Central Valley Project at issue here. Furthermore, as we have shown (Pet. Br., *Dugan v. Rank*, No. 31, pp. 44-46), Congress was kept aware of the manner in which the United States was affecting existing rights by the operation of Friant Dam, and Congress fully ratified that conduct.

authority in determining the rates at which Project water should be sold, "[t]he complaint of Fresno in this regard is a complaint against the United States and this dispute may not be entertained judicially without a waiver of sovereign immunity on the part of the United States" (R. VII: 381), and, as the court had held (R. VII: 386), there had been no such waiver. This ruling, too, was correct.

Just as Fresno's claim for a judicial declaration of superior water rights is "clearly directed at the sovereign," *Larson v. Domestic & Foreign Corp., supra*, 337 U.S. 682, 689, n. 9 (see p. 24, *supra*), the City's claim for a judicial declaration of a right to contract for Project water is similarly a claim directly against the United States and similarly "would clearly have been beyond the court's jurisdiction" (*ibid.*). Moreover, the enforcement of such a right would, of course, require affirmative action by the United States through its officials—namely, the execution of a contract for the delivery of water to Fresno at the lower rate. Since this relief would thus "require affirmative action by the sovereign" and "compel it to act," *Larson v. Domestic & Foreign Corp., supra*, 337 U.S. at 691, n. 11, 704, it is barred by sovereign immunity.⁹ Nor is this conclusion avoided

⁹ Similarly, since affirmative action would be required of the Secretary of the Interior, who is the officer empowered by statute to execute such contracts, Reclamation Project Act of 1939, Section 9(c), 53 Stat. 1193, as amended, 43 U.S.C. 485h(c), the Secretary (who was not served and did not appear, see note 1, p. 5, *supra*) is clearly an indispensable party under *Hynes v. Grimes Packing Co.*, 337 U.S. 86, and *Williams v. Fanning*, 332 U.S. 490. Fresno's reliance on *Work v. Lou-*

by the fact that the relief was granted in terms of a "right"; sovereign immunity cannot be evaded by couching relief sought in terms of a declaration of a right to enter into a contract containing certain terms, rather than by directing a mandatory injunction to compel government officers to contract on those terms. *Love v. United States*, 108 F. 2d 43, 50 (C.A. 8); *Anderson v. United States*, 229 F. 2d 675 (C.A. 5); cf. *Blackmar v. Guerre*, 342 U.S. 512, 515-516.

Fresno seems to argue (Fresno Br. 92-115) that the doctrine of sovereign immunity does not apply here because it would be beyond the statutory (and perhaps even constitutional) authority of the respondent officials to charge Fresno more for municipal water than it charges other users for irrigation water. The court below disposed of any such contention thus (R. VII: 381):

In negotiating and contracting for the delivery of water from Friant Dam, defendant officials were acting within the scope of their statutory authority and were carrying out the duties imposed upon them by their official positions. It is their administrative function to determine the rates at which water shall be delivered. * * *

Fresno has come forward with no adequate basis for challenging that conclusion.

Any constitutional attack on the federal charges for the use of Project water, as implemented by the respondent officials, is wide of the mark. Section 3,

island, 269 U.S. 250 (Fresno Br. 99), points up the necessity of joinder of the Secretary, since that case was a mandamus proceeding against the Secretary of the Interior.

Article IV, of the Constitution imposes exclusive and unlimited authority upon Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," see *Sioux Tribe v. United States*, 316 U.S. 317, 324; *United States v. San Francisco*, 310 U.S. 16, 29. The power thus granted to manage federal reclamation facilities plainly embraces the authority to regulate charges for the benefits resulting from their operation. Irrespective of where title to the water stored and distributed by the government's reclamation facilities lies (see *Fresno Br.* 96-98), their operation for the benefit of the public bestows a federal privilege, and "the power of the Federal Government to impose reasonable conditions on the use of * * * federal privileges" is, as this Court observed in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 295, "beyond challenge * * *." See also *Yuma County Water Users' Ass'n v. Schlecht*, 262 U.S. 138, 145-146; *Swigart v. Baker*, 229 U.S. 187. As we show below, in view of the prime purpose of the reclamation legislation to promote irrigation, it was entirely reasonable for Congress to determine that users of reclamation project water for irrigation should pay a lower rate than users for municipal, industrial or power purposes.

The original act authorizing the construction and operation of federal reclamation projects, the Reclamation Act of 1902, Section 4, 32 Stat. 389, 43 U.S.C. 461, provided that charges for irrigation water "shall be determined with a view of returning to the recla-

mation fund the estimated cost of construction of the project, and shall be apportioned equitably.”¹⁰ This Court, in *Swigart v. Baker*, *supra*, 229 U.S. at 197-199, held that the cost of maintaining the project was also properly taken into account in determining the charges for irrigation water. In that case the Court also recognized that interest on the amount of construction costs that have not been returned to the reclamation fund is not charged users of irrigation water. 229 U.S. at 197; see also *Ivanhoe Irrigation District v. McCracken*, *supra*, 357 U.S. at 295.

The first provision for the supplying of water from reclamation projects to others than irrigators was Section 4 of the Town Site Act of 1906, 34 Stat. 116, 43 U.S.C. 567, which authorized the Secretary of the Interior to provide “towns or cities on or in the immediate vicinity of irrigation projects” with project water and to fix charges for such water which “shall not be less nor upon terms more favorable than those fixed * * * for the irrigation project from which the water is taken.” This implicit authority to charge municipalities higher rates than those paid by irrigators was made explicit by Section 9(c) of the Reclamation Project Act of 1939, 53 Stat. 1193, as amended, 43 U.S.C. 485h(c). That section authorized the Secretary “to enter into contracts to furnish

¹⁰ As this Court has recognized, the “estimated cost of construction” cannot usually be determined until the construction of the project is virtually complete, so that water charges must be based on tentative estimates, subject to whatever adjustments later circumstances dictate. See *Ivanhoe Irrigation District v. McCracken*, *supra*, 357 U.S. at 298; see also *Yuma County Water Users’ Ass’n v. Schlecht*, 262 U.S. 138, 143-144.

water for municipal supply or miscellaneous purposes," and to require payment,

- * * * (1) * * * with interest not exceeding the rate of $3\frac{1}{2}$ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or
 (2) * * * at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper * * *¹¹

Thus, not only was the Secretary authorized to include a charge for municipalities that is not included for irrigators—i.e., interest (see p. 31, *supra*)—but he was given broad discretion to determine what would be an "appropriate share" of construction costs or operation and maintenance costs for a municipality to pay.

Congress, moreover, has been fully aware that the Secretary has implemented this statutory authorization to charge municipalities higher rates for project water than irrigators. For example, in the Senate hearings on the 1951 Interior Department appropria-

¹¹ With respect to the sale of electric power or the lease of power privileges, the Secretary was authorized to fix "such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper * * *."

tions, the subject of the utilization of project water for municipal purposes came up, and the subcommittee chairman, Senator Hayden, said, "Usually the rate of the municipality for water is higher than the rate for irrigation. I think they probably would be charged more for municipal purposes—it is more valuable to them." Hearings before the Senate Subcommittee on Appropriations, Interior Department, 1951, 81st Cong., 2d Sess., p. 1114. At those same hearings the Department submitted a statement as to the basis of charges for municipal water, which made it clear that such charges are set in accordance "with the particular circumstances under which municipal water has been provided," not in relation to the charges made for irrigation water (*id.* at p. 1115):

Among other things, these varying circumstances have involved existence of prior municipal water rights * * *, the point of delivery of the water * * *, the purpose for which water was used within the municipal limits (for irrigation, domestic, municipal or industrial uses), the extent to which the municipality contributed to the project by transfer of lands or other rights * * *, the type, extent, and cost of facilities necessary to make municipal water available provided by the United States, who constructed and paid for the construction and operation and maintenance of specified facilities, the degree of permanency of the municipal water right involved, the choice of contract as to repayment or water service, and many other special local considerations.

Furthermore, Congress was expressly advised, as early as 1946, as to the basis for the Secretary's determination of the appropriate charge for municipal water in the Central Valley Project (*i.e.*, \$10.00 per acre-foot¹²):

It is estimated that, under full operation of the authorized project, gross annual revenues from the sale of municipal and industrial water [at this rate] will amount to \$680,000, whereof \$119,070 will be necessary to support operation, maintenance, and replacement costs, and \$560,930 will be available for application to capital costs. This will be sufficient to repay the allocated costs during the project repayment period, plus 3 percent interest on the unpaid balance, and to meet an appropriate share of other fixed costs of the project water supply.

H. Doc. No. 146, 80th Cong., 1st Sess., p. 19, quoted in 1 Central Valley Project Documents, H. Doc. No. 416, 84th Cong., 2d Sess., pp. 595-596. Congress was also advised as to the reasonableness of this rate (*id.* at p. 595):

This rate may be judged by comparison with prevailing rates in areas adjacent to those where sales are contemplated. The principal alternative source sells water on a rate schedule varying from \$52.27 to \$95.83 per acre-foot within its district, depending on the amount used and exclusive of meter service charges. This water is treated, but the cost of treatment will not exceed \$10 per acre-foot. * * *

¹² See pp. 6, 9, n. 4, *supra*.

In short, in this, as in all aspects of the Central Valley Project, Congress was kept fully informed, and, with full knowledge of what had been done and what was planned, Congress continued to appropriate funds and to authorize expansion of the project by adding new elements (see *Pet. Br., Dugan v. Rank*, No. 31, pp. 44-46).

The prime purpose of the reclamation laws and of the projects authorized and constructed under them has been the promotion of irrigation. See, e.g., Reclamation Act of 1902, Section 1, 32 Stat. 388, as amended, 43 U.S.C. 391; *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 731-742. Other purposes—navigation, flood control, salinity prevention, recreation and fish and wildlife preservation—and other uses of project water, such as for domestic, municipal, industrial and power purposes, are clearly incidental to that central aim. Indeed, the Reclamation Project Act of 1939, 53 Stat. 1193, as amended, 43 U.S.C. 485h(c), provides that “[n]o contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.” Accordingly, it cannot be said that Congress was acting unreasonably when it determined that irrigation should receive a substantial subsidy in the form of non-payment of interest, while other uses should receive little or no such bounty. See *Ivanhoe Irrigation District v. McCracken*, *supra*, 357 U.S. at 295-296. Fresno’s claim that it should receive the

same subsidy, rather than being expected to pay an "appropriate share" of the cost of bringing it municipal water, is without the slightest warrant in either the Constitution or any Act of Congress.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed insofar as it sustained the claims that the City of Fresno pressed in common with the other plaintiffs in this proceeding (see pp. 11-22, *supra*) and affirmed insofar as it directed the dismissal of those claims that the City of Fresno alone advanced (see pp. 22-36, *supra*).

Respectfully submitted,

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Supreme Court of the United States

October Term, 1962

No. 51

CITY OF FRESNO,

Petitioner,

vs.

STATE OF CALIFORNIA, UNITED STATES OF AMERICA,
et al.,

Respondents.

**On Writ of Certiorari to the United States Court of
Appeals for the Ninth Circuit.**

REPLY BRIEF OF PETITIONER.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. 51

CITY OF FRESNO,

Petitioner,

vs.

STATE OF CALIFORNIA, UNITED STATES OF AMERICA,
et al.,

Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER.

I.

OPINIONS IN THE COURTS BELOW.

The opinions in the District Court, the Decision No. D 935 of the California Water Rights Board and those of the Ninth Circuit Court of Appeals are set forth at page 2 in petitioners' opening brief and are incorporated herein by reference.

II.

JURISDICTION.

The jurisdiction of this Court is set forth at page 6 of petitioners' opening brief and is incorporated herein by reference.

III.

**THE CONSTITUTIONAL, PROVISIONS, STATUTES
AND DOCUMENTS WHICH THE CASE IN-
VOLVES.**

The constitutional provisions, statutes and documents which the case involves are set forth in Appendix "A" of petitioners' opening brief, pages 1 to 19 thereof, and incorporated herein by reference.

The constitutional provisions, statutes and documents specifically referred to in this brief are here listed.

"SEC. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.*" (emphasis ours)

Act of June 17, 1902, 32 Stat. 388 at 390 (43 U.S.C. 391).

"The Secretary is authorized to enter into contracts to furnish water for municipal water sup-

ply or miscellaneous purposes: *Provided*, That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of $3\frac{1}{2}$ percentum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 percentum per annum, and such other fixed charges as the Secretary deems proper: *Provided further*, That in said sales or leases preference shall be given in municipalities and other public corporations or agencies; and also to cooperatives and

other non-profit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936 and any amendments thereof. Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of water from such project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges shall be in addition and alternative to any authority in existing laws relating to particular projects. *No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.*" (emphasis ours)

Act of August 4, 1939, 53 Stat. 1187 at 1194.

"Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized THE SECRETARY OF THE INTERIOR SHALL MAKE RECOMMENDATIONS FOR THE USE OF WATER IN ACCORD WITH STATE WATER LAWS, INCLUDING BUT NOT LIMITED TO SUCH LAWS GIVING PRIORITY TO THE COUNTIES AND AREAS OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (emphasis ours)

Act of October 14, 1949, 63 Stat. 852 and 853.

"Sec. 2. The Secretary is hereby authorized to negotiate amendments to existing contracts entered into pursuant to section 9, subsection (e), of the Reclamation Project Act of 1939 to conform said contracts to the provisions of this Act.

"Sec. 3. As used in this Act, the term 'long-term contract' shall mean any contract the term of which is more than ten years.

"Sec. 4. Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired, thereunder, and the Secretary in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

"Sec. 5. This Act shall be a supplement to the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto).

Approved July 2, 1956."

Act of July 2, 1956, 70 Stat. 483 at 484.

IV.

QUESTIONS PRESENTED FOR REVIEW.

The same questions set forth at page 90 of petitioners' opening brief constitute the general questions presented for review in this brief, which said questions for review are incorporated herein by reference.

However, all of these questions will not be specifically commented upon in this brief. We will limit our argument to answering respondents' brief insofar as said brief relates to the questions presented for review in petitioners' opening brief herein.

We will particularly stress the following questions:

Whether under the Basic Reclamation Act of June 17, 1902, 32 Stat. 388, 389-390, and the Act of October 14, 1949, 63 Stat. 852, 853, the respondent Bureau of Reclamation officials are required to proceed in conformity with California county and watershed of origin protective statutes.

Whether the determination of the question of the limits of the statutory authority of the Bureau of Reclamation officials is a judicial determination and not an administrative determination, and if it is a judicial determination, whether the decision of the District Court that any charge for strictly irrigation water (not municipal water) to the City of Fresno in excess of \$3.50 per acre-foot is unreasonable, is a judicial or an administrative determination.

Whether the City of Fresno is entitled to at least 100,000 acre-feet of water out of the Central Valley Project (being 40,000 more than the contract finally awarded the City of Fresno) in view of the fact that there is no other possible source of supply for this water

to the City other than out of the San Joaquin River, and whether it is even beyond the power of Congress after it has constructed dams on every stream in the San Joaquin Valley including the San Joaquin River to prohibit the City of Fresno from obtaining a sufficient water supply at reasonable rates in order to survive until all secondary agricultural requirements in the San Joaquin Valley are first met.

V.

STATEMENT OF THE CASE.

We again incorporate by reference the statement of the case beginning at page 14 of petitioners' opening brief and will not again repeat it here.

VI.

ARGUMENT.

A. Respondents Failed to Answer Most Major Arguments of Petitioner City of Fresno. It Is Assumed They Were Unable To.

Respondents failed to answer many of the major arguments raised by petitioner City of Fresno in its brief and in some cases attempted to raise new issues not set forth in their petitions for certiorari. Since these issues which respondents failed to answer go to the fundamentals of the present case, we assume they were unable to answer them and that the petitioner City of Fresno's arguments are correct. Petitioner City of Fresno's major arguments in this case which respondents failed to answer are here set forth.

1. That All Respondents Requested the District Court to Make Decree of Physical Solution.

At page 61 of petitioner City of Fresno's opening brief, petitioner stated "All Parties Requested That the District Court Make a Physical Solution". At pages 57 and 58 of the City of Fresno's reply brief in companion case No. 115 before this Court are to be found quotations from pleadings and statements of counsel for petitioning districts requesting the District Court to make a decree of physical solution in this case.

Nowhere in respondents' brief do respondents deny they requested the District Court to make a physical solution.

Neither do respondents deny that they joined with the State of California in putting a proposed plan of physical solution into evidence.

It must therefore be assumed that all respondents not only requested the District Court to make a physical solution but introduced one in evidence in this case.

2. That the District Court Had the Power to Make a Physical Solution.

In the first place it should again be pointed out that, as the Court below stated, the decree of physical solution was evolved by California Courts to aid appropriators of California waters like the United States—not to aid the riparian owners such as the petitioners herein.

"The decree of physical solution is not then a detriment imposed upon the Bureau. It is a grant of right to the Bureau; and a detriment or limitation upon the rights of the plaintiffs to the full natural flow of the river. The judgment of the Bureau to accept the physical solution or, in the

alternative, to reject it and resort to condemnation remains available." (emphasis ours)

State of California, United States of America v. Rank, 293 F. 2d 340, 353 (1961).

As shown at page 24 of our opening brief, a decree of physical solution in this case would probably save the United States \$100,000,000 since if this Court should reverse the finding of the District Court and the Court below that a decree of physical solution is proper under the alternative prayer of original plaintiffs complaint asking for damages in "inverse condemnation" in event their prayer for a physical solution is denied [R. 38] the District Court would of necessity have to determine damages for the destruction of the 100,000 acres of valuable Fresno County farm land it found would be destroyed [R. 938, Finding 26A] if the Court's plan of physical solution were not put into effect.

Even the Bureau officials and the Secretary of the Interior have requested a decree of physical solution in this case which in general agreed with the State of California's plan of physical solution. The State's plan of physical solution only varied from the District Court's plan in calling for a lesser number and different type of check dam than the Court decreed.

"We recommend that you affirm the principle of this plan for a physical solution, with the understanding that in the details of its execution it will be reconciled in so far as practicable with the plan filed by the State of California, and that you so inform the Attorney General."

R. 295, Deft. Ex. A-79-A. Signed: Douglas McKay, Secretary of the Interior, Rep. Tr. 21,975.

It is not the Bureau of Reclamation officials in this case who object to the money and water saving decree of physical solution but one of the Department of Justice's attorney, Mr. William Veeder, one of opposing counsel herein. Mr. Veeder first came into this case after the trial in the District Court against the Bureau officials had been concluded for all practical purposes and his efforts to destroy California's water rights have so displeased Congress in the past that Congress, like they did in the case of Richard Boke, stopped his salary in another California case involving the rights of the United States to a California stream until he quit his attacks on California water rights.¹

At pages 63 to 67 of petitioner City of Fresno's opening brief, authorities are cited showing that this Court has approved decrees of physical solution on many occasions. This contention also was not denied by the respondents anywhere in their brief nor in their brief filed as petitioners in companion case No. 115 before this Court.

We again state the position of this Court on decrees of physical solution, a case involving the operation by

3) In the Act of July 10, 1952, an appropriation bill, the Congress prohibited the use of Department of Justice funds for the preparation of prosecution of this litigation, Act of July 10, 1952, Sec. 208(d), 66 Stat. 560." Sec. (d) None of the funds appropriated by this title may be used in the preparation or prosecution of the suit in the United States District Court for the Southern District of California, Southern Division, by the United States of America against Fallbrook Public Utility District, a public service corporation of the State of California, and others.

United States v. Fallbrook, 165 F. Supp. 806, 846 (1958).

the Bureau of Reclamation of the San Joaquin River under the Central Valley Project.

"* * * If * * * one seeks to appropriate the water wasted or not put to any beneficial use, it is obligatory that he find some physical solution, at his expense, to preserve existing prior rights, or if this cannot be done, and the water is to be appropriated, nonetheless, under the right of eminent domain, the riparian owners, prior appropriators and overlying landowners must be compensated for the value of the rights taken. *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 40 P. 2d 486; *City of Lodi v. East Bay Municipal Utility District*, 7 Cal. 2d 316, 60 P. 2d 439; *Hillside Water Co. v. City of Los Angeles*, 10 Cal. 2d 677, 76 P. 2d 681; *City of Los Angeles v. Aitken*, 10 Cal. App. 2d 460, 52 P. 2d 585; *Los Angeles Flood Control District v. Abbot*, 24 Cal. App. 2d 728, 76 P. 2d 188." (emphasis ours)

Gerlach Live Stock Co. v. United States, 111 Ce. Cls. 1, 81, Aff. 335 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

The Court of Appeals below has also upheld the power of the District Court to make a decree of physical solution herein in at least three cases.²

²"The California Courts, confronted with the command of the 1928 Constitutional amendment that water should not be wasted, and also with the guaranties of that amendment that existing water rights be preserved to the extent of their present and prospective * * * decree which for the sake of convenience is called a 'physical solution.'

"In essence, such decree is but the conditional injunctive decree of a court of equity. Such decrees in California water rights cases are characteristic examples of the preservation by equity courts of the elements and flexibility and expansiveness

It is therefore submitted that as far as the respondent districts are concerned they all admit that they requested a decree of physical solution, that they all joined with the State of California in submitting into evidence a plan of physical solution, consisting of several stationery check dams in the San Joaquin River between Friant and Gravelly Ford Canal, and that they at no time denied the District Court had the power to make a decree of physical solution.

3. **That This Is Not a Suit Against the United States Insofar as the Determination of the Question of Whether the Rates Attempted to Be Charged the City of Fresno by Respondent Bureau of Reclamation Officials Are Unreasonable, Illegal, Arbitrary and in Excess of the Statutory Authority of Respondent Officials.**

The District Court held that the United States although a necessary party to the doing of complete

so that new remedies may be invented or old ones modified in order to meet the requirements of every case and to satisfy the needs of every progressive social condition."

State v. Rank, 293 F. 2d 340, 344 (1951).

"9. The term 'physical solution as used in California water law apparently contemplates a court-enforced plan for making as much water as possible available, through the construction of dams or canals or other physical or mechanical instruments, to all the lawful claimants of the waters in dispute. * * * See: *Peabody v. City of Vallejo*, 1935, 2 Cal. 2d 351, 40 P. 2d 486, 497; *Rancho Santa Margarita v. Vail*, 1938, 11 Cal. 2d 501, 81 P. 2d 533, 562; *Tulare Irr. Dist. v. Lindsay-Srathmore Irr. Dist.*, 1935, 3 Cal. 2d 489, 575, 45 P. 2d 972; *City of Lodi v. East Bay Municipal Utility District*, 1936, 7 Cal. 2d 316, 341, 60 P. 2d 439. See also *Rank v. Krug*, D. C. S. C. Cal. 1950, 90 F. Supp. 773, 803."

State of California v. United States District Court, 213 F. 2d 818, 821 (Footnote 9) (9th Cir.) (1954).

"* * * Perhaps some physical solution by or control under court decree could permit participation by all in the conservation of all flow of the watershed for beneficial use that no drop would waste uselessly into the Pacific."

People of State of California v. United States, 235 F. 2d 647, 662 (9th Cir.) (1956).

relief in this case was not an indispensable party so far as obtaining relief against the respondent officials was concerned.

"The United States is a *necessary* party to the doing of complete relief, though it would not be an *indispensable* party to the obtaining of relief only against the defendant officials." (emphasis ours)

Rand v. (Krug) United States, 142 F. Supp. 1, 78 (1956).

The Court below partially affirmed this portion of the decision of the District Court holding that the United States was not an indispensable party so far as the District Court's plan of physical solution was concerned but was an indispensable party so far as obtaining water by the City was concerned. Respondent Districts, however, cite not one single authority backing this part of the decision of the Court below.

At page 94 of petitioners' opening brief in this action No. 51, petitioners cited decisions of this Court involving attempted illegal Bureau of Reclamation charges which held that the determination of the limits of statutory authority of federal officials is a judicial and not an administrative determination.

At page 98 of their brief, petitioners cite decisions of this Court and other federal courts that an action to determine whether water rates attempted to be charged by Bureau of Reclamation officials are unreasonable, illegal or arbitrary is not a suit against the United States. We now briefly again cite three decisions of this Court involving these two points and one of several decisions of the Courts of Appeals hold-

ing that such a suit as this is not an action against the United States.

Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143 (1912);

Yuma County Water Users' Ass'n v. Schlecht, 262 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909 (1922);

Ickes v. Fox, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937).

* * *. The questions whether or not the charges alleged to be illegal and the acts and threatened acts of executive officers depriving the shareholders of a water users' association of water * * * are justified by law, are questions of law which a court of equity is empowered to determine in a suit of such an association against such executive officers, although the Secretary of the Interior or other executive officers have already decided them.

"3. United States—'Suit Against United States' Interference With Rights.

"A suit against executive officers of the United States to enjoin them from committing acts unauthorized by or in violation of law, to the irreparable injury of the property rights of the plaintiff, is not a 'suit against the United States', nor is it or the injunction sought objectionable, either on the ground that they interfere with the property or the possession of the property of the United States. * * *," (emphasis ours)

Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 Fed. 72, 73 (8th Cir.) (1914).

Swigart v. Baker, supra, was a suit for an injunction by a member of an irrigation district which was supplied with water from the Sunnyside unit of the Yakima Irrigation Bureau of Reclamation Project in eastern Washington, against the local officials of the United States Bureau of Reclamation in regard to the reasonableness and legality of certain rates for water the Secretary of the Interior was charging. Neither the Secretary of the Interior nor the United States was a party. The District Court of eastern Washington ruled that this suit was not one against the United States. We quote:

"(2) The respondents claim that this is, in effect, a suit against the government. If the position taken by the complainant is sound, and the respondents, without authority of law, are attempting to deprive him of rights accorded to him by the law, the claim that this is a suit against the government is utterly unfounded."

Baker v. Swigart, 196 Fed. 569, 571 (1912).

This Court affirmed this judgment of the District Court in the above-entitled case, we quote:

"The decree of the Circuit Court of Appeals is reversed, that of the District Court is affirmed, and the case remanded to the District Court."

Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 648, 57 L. Ed. 1143 (1912).

Yuma County Water Users' Ass'n v. Schlecht, supra, was a suit for an injunction by owners of tracts of land in the Bureau of Reclamation's Yuma Irrigation Project against "local officials of the Yuma Project of United States Reclamation Service." (*Yuma County*

Water Users' Ass'n v. Schlecht, 275 Fed. 885 (9th Cir.) (1921), to determine the legality and reasonableness of water rates under the project. The United States was not a party.

As shown in all of the above suits, the reasonableness and legality of water charges by Bureau of Reclamation officials under Reclamation Projects was decided *and in none of the above decisions of this Court was the United States a party.*

Nowhere in respondents' brief did respondents attempt to distinguish the above cases, nor do we believe they can distinguish them.

4. **That the United States Must Proceed in Construction and Operation of the Central Valley Project in Accordance With California County of Origin and Watershed of Origin Statutes and Congressional Acts Giving Priority to Counties and Areas of Origin.**

At pages 137 to 151 the petitioners in their opening brief cited in support of their position that the respondent Bureau of Reclamation officials must obey California County of Origin and Watershed protective acts, among other things, representations by the respondent Bureau of Reclamation officials that they were obliged to proceed in conformity with California's County of Origin and Watershed of Origin protective statutes.³

³66. In addition to respecting all existing water rights, the Bureau in this report has complied with California's *County of Origin* legislation, which requires that water shall be reserved for the *presently unirrigated lands of the areas in which the water originates, to the end that only surplus waters will be exported elsewhere.*" (emphasis ours)

the opinions of the Attorney General of California,⁴ the opinion of the California Water Rights Board⁵ and

⁴"The opinions of the State Attorney General mentioned above declare that both the State and Federal Government in the operation of the CVP are subject to the *restrictions* of the County or Origin Law and the Watershed Protection Act." (emphasis ours)

Central Valley Project Documents, 85th Congress, 1st Session, House Document No. 246, 516. (1956).

"(2) In the circumstances specified in the statute, Water Code Sections 10505 and 11460 would require that *water* which had been put to use in the operation of the Central Valley Project in areas outside the county of origin, or the watershed of origin and areas immediately adjacent thereto, be withdrawn from such outside areas and made available for use in the specified area of origin.

"(3) Water Code Sections 11460 and 11463 are applicable to the United States in its operation of the Central Valley Project
* * *

25 Opinions, Attorney General p. 9 (1955).

"From what has already been said, it follows that the interim use of water reserved for counties of origin under section 10505, or for watersheds of origin under section 11460 and 11463 is subject to termination whenever such water becomes necessary for development of such areas of preference and proper applications to appropriate the water for use therein are filed and granted. In such case *there would be no right of reimbursement for the project works* which had been used for the interim use of the water exported." (emphasis ours)

25 Opinions, Attorney General p. 27 (1955).

"The legislative background of the priority makes it difficult to conceive that the Legislature intended that the authority could destroy the priority by condemnation. Since the priority exists only as against the authority, such a construction would completely destroy the effect of Section 11460 and make its enactment an idle gesture."

25 Opinions, Attorney General p. 21 (1955a).

"* * * as a matter of both state and federal law, it appears that the United States, the Bureau of Reclamation as well as its parent organization, the Department of the Interior and the Secretary thereof, are obligated to observe Water Code Sections 11460-11463, in carrying out the Central Valley Project."

State Water Rights Board of the State of California, Decision No. D-935, Adopted June 2, 1959, p. 100.

"* * *. Whatever may have been the intent of the Legislature in adopting these statutes we cannot conclude that it was intended thereby to deprive areas such as the City of Fresno

even the specific act of Congress requiring the respondent Bureau officials to act in accordance with California County and Watershed of Origin protective laws.⁶

Nowhere in respondents' brief is there any attempt to answer petitioners' position that Respondent Bureau officials are bound by California's county of origin and watershed of origin protective acts in the operation of the Central Valley Project. It is obvious that petitioners cannot and do not deny that the Respondent Bureau officials are bound by California's county of origin and watershed of origin protective statutes in its operation of the Central Valley Project.

and the Fresno Irrigation District of a source of water supply so readily accessible to them as that obtainable from the San Joaquin River. * * * we believe that the Legislature in adopting 'Watershed Protection' Sections 11460-11463 and 'County of Origin' Sections 10500, 10504 and 10505, was expressing a policy that areas such as the City and the District, both highly developed and well established, located almost at the very outlets of Friant Dam should not incur deficiencies in supply such as they are now suffering while water is transported past them to distant undeveloped lands." (emphasis ours)

State Water Rights Board of the State of California, Decision No. D-935, Adopted June 2, 1959, p. 72.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, that the Central Valley Project, California, authorized by section 2 of the Act of Congress of August 26, 1937 (50 Stat. 850), is hereby reauthorized * * *

"Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the USE OF WATER IN ACCORD WITH STATE WATER LAWS, INCLUDING BUT NOT LIMITED TO SUCH LAWS, GIVING PRIORITY TO COUNTIES AND AREAS OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (emphasis ours)

Act of October 14, 1949, 63 Stat. 852, 853.

In fact it would be impossible for opposing counsel, Adolph Moskovitz, who is the principal writer of respondents' brief to deny that such is the law, for he himself was one of the authors of the opinions of the Attorney General of the State of California, holding that the United States in the operation of the Central Valley Project is bound by California's County of Origin and Watershed of Origin protective statutes as shown by the following:

"Opinion by: Edmund G. Brown, Attorney General, Adolphus Moskovitz, Deputy."

25 Opinions, Attorney General p. 1 (1955).

Like a certain prominent dictator's remarks on Berlin, we feel that this article must truly be a 'bone in the throat' of opposing counsel.

It will be noted that nowhere in respondent districts' brief was there any attempt to urge that the Act of October 14, 1949, was not controlling here. Other authorities to the effect that the United States is required to conform to California's County of Origin and Watershed of Origin protective statutes are to be found at pages 145 through 152 of petitioners' opening brief in this case.

As will later be shown, opposing counsel seeks to avoid the effect of the effect of the undisputed laws protecting counties and watersheds of origin by raising immaterial issues which they did not raise in their petition for certiorari and which therefore should not now be considered by this Court.

5. **The County of Origin and Watershed of Origin Protective Rights May Not Be Taken by Eminent Domain.**

Both the Act of October 14, 1949, 63 Stat. 852, 853 and the following opinion of the Attorney General of California clearly show that water to which California counties and areas of origin are entitled may not be taken by eminent domain or condemnation.

"The legislative background of the priority makes it difficult to conceive that the Legislature intended that the authority could destroy the priority by condemnation. Since the priority exists only as against the authority, such a construction would completely destroy the effect of Section 11460 and make its enactment an idle gesture."

25 Opinions, Attorney General, p. 21 (1955).

The efforts of respondent officials to put their plan of physical solution into force by contracts with some of the riparian owners between Friant Dam and Gravelly Ford Canal also negative any authorization by Congress to take these rights.

"* * *. The fact alleged in the petition that at some time in 1919 the War Department *offered to purchase part* of this land for the fire control station — perhaps only a few square feet, or a rod, out of a 200-acre tract—when considered in connection with the other facts stated, serves not to prove, but to negative, authorization to make the taking asserted in this suit." (emphasis ours)

Portsmouth Harbor Land & Hotel Co. v. United States, 260 U. S. 327, 339, 43 S. Ct. 135, 140, 67 L. Ed. 287 (1922).

6. **The Determination of the Amount of Water a County or Watershed of Origin is Entitled to Is a Judicial Not an Administrative Decision.**

It having been conclusively shown that both petitioner, City of Fresno and the riparian owners between Friant Dam and Gravelly Ford Canal are entitled to have all necessary water reserved for them to supply their present and future needs and that said rights may not be taken by eminent domain, we submit the determination of the amount of water to which their rights entitle them to is a judicial and not an administrative decision.

"* * * what is a useful and beneficial purpose, and what is an unreasonable use is a judicial question depending upon the facts in each case. Likewise, what is a reasonable or unreasonable use of water is a judicial question *to be determined in the first instance by the Court.*" (emphasis ours)

Gin S. Chow v. City of Santa Barbara, 217 C. 673, 706, 22 P. 2d 5 (1933).

B. Respondents Attempt to Raise Issues in This Brief Not Raised in Their Petition for Certiorari.

Respondents in order to attempt to avoid the law that the Bureau of Reclamation officials must conform to the California county and watershed of origin protective acts and the Act of Congress of October 14, 1949, 63 Stat. 852, 853, as shown in the preceding chapter for the first time in their reply brief in this case attempt to raise a new issue in their brief, viz., that respondent districts in Kern and Tulare Counties are in the watershed of the San Joaquin River within the meaning of the county of origin and watershed of origin protective

statutes of the State of California. Such contention is not only without merit but since no such question was set forth in their petition for certiorari,⁷ under the rules of this Court it should not now be considered.

"The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari but the brief may not raise additional questions or

⁷The questions presented in the districts' petition for certiorari did not include any contention that the petitioning districts were in the watershed of the San Joaquin River. In fact the entire case was tried under the theory that they were in the watershed of the San Joaquin River. As shown by the following questions presented by the petition for certiorari of all respondent districts filed in Case No. 966, October Term, 1961:

"1. Whether the operation by federal officials of a federal reclamation project and their notification of intent with respect thereto resulted in an authorized taking by physical seizure of vested water rights * * *.

"2. Whether the districts should not be dismissed in an action to enjoin the alleged illegal interference with vested water rights * * * where the districts make no claim on their own behalf to the plaintiffs alleged rights.

"3. Adopt and incorporate by reference the question presented on page 2 of petition for writ of certiorari filed by Solicitor General in Dugan v. Rank, October Term 1961 No. 366."

Districts' Petition for Certiorari, Case No. 966, October Term 1961, pages 3-4.

Neither was such a question raised in the petition of Attorney General for certiorari.

"1. Whether a United States district court is empowered by injunctive orders directed to subordinate officials of the Bureau of Reclamation to effect a continuing regulation of a federal reclamation project.

"2. Whether the operation of a federal reclamation project in such a way as * * * to interfere with landowners enjoyment of water rights * * * should be treated as a taking by eminent domain.

"3. Whether a suit against officials of the Bureau of Reclamation * * * is in fact a suit against the United States."

Solicitor General's Petition for Certiorari, Case No. 366, October Term 1961, page 2.

change the substance of the questions already presented in those documents." (emphasis ours)

Federal Practice and Procedure Rules Ed., Barron and Holtzoff-Wright, Vol. 3A, pp. 1539 (1958).

However, although the question is not properly before this Court and without waiving our objection on that ground, we will briefly comment on this erroneous contention of respondents. The District Court held that the watershed of the San Joaquin River was located entirely in the Counties of Fresno and Madera and that none of the respondent districts served by the Friant-Kern Canal were located in the watershed of the San Joaquin River.

"The watershed of the San Joaquin River is located entirely in the County of Fresno and Madera."

Rank v. (Krug) United States, 142 F. Supp. 1, 153 (1956).

"The area of all the irrigation districts served by the Friant-Kern Canal are located in counties other than either Madera or Fresno."

Rank v. (Krug) United States, 142 F. Supp. 1, 153 (1956).

Referring to the Tule, Kern and Kaweah Rivers the District Court held they had their own separate watersheds separate from the San Joaquin.

"Each of the above-named river systems has a separate well-defined watershed area * * *. Each is a separate river and river system, and has been historically known as such."

Rank v. (Krug) United States, 142 F. Supp. 1, 43-44 (1956).

The holding of the District Court was upheld by the Court below.⁸

"Save in the respects here specified the judgment of the District Court is affirmed."

State of California, United States of America v. Rank, 293 F. 2d 340, 351 (1961).

Respondents in their petitions for certiorari did not contend these rulings of the District Court were erroneous. They must therefore stand.

Without waiving our objection to respondents raising issues not raised in their petitions for certiorari we will briefly show that the contention of respondents is incorrect.

Respondents base their contention upon some erroneous dicta of the District Court quoted in footnote 15 at page 32 of their reply brief referring to erroneous statements of the District Court in regard to alleged overflows of the Kern River into the San Joaquin, which the evidence in this case conclusively showed were overflows (if they ever occurred) *caused by artificial changes only* and could therefore not affect the determination of what constituted the natural watershed of any river.

As the District Court clearly states the waters that we are concerned with here are those waters originating in a distinct watershed above the junction of Fresno

⁸The District Court was clearly in error in its statement that the San Joaquin backed into Tulare Lake. The lowest outlet from Tulare Lake is Summit Lake with an elevation above sea level of 205 feet. (Burrell Quadrangle, U. S. G. S.) (1950). Whereas the top of Mendota Pool has an elevation of 158 feet above sea level (Mendota Quadrangle, U. S. G. S.) (1946). In other words, to back water into Tulare Lake the depth of the San Joaquin at top of Mendota Dam unsupported by any dam would be 47 feet above the top of Mendota Dam—an impossibility.

Slough and Mendota, where the artificial seepage was supposed to enter the San Joaquin.

"We are concerned here only with the waters of the San Joaquin river as they flow southwesterly from the mountains to Mendota."

Rank v. (Krug) United States, 142 F. Supp. 1, 44 (1956).

Respondents' Documents Cited in Their Reply Brief Show That Any Water of the Kern River Caused to Flow Into Tulare Lake or Tulare Lake to Flow Out of Its Basin Was Done by Artificial Levies and Artificial Channels.

Respondent districts in their brief quote with approval California Division of Water Resources Bulletin 29, San Joaquin Basin (1931). This document itself conclusively proves that there was never a natural flow from the Kern River into Buena Vista Lake and thence into Tulare Lake. We quote:

"Immediately south of the San Joaquin River is a natural ridge or barrier formed by the Kings river Delta on the east side of the valley trough and to a minor extent from Panoche Creek on the west. In the depression south of the ridge is Tulare Lake which flows north through Fresno Slough to the San Joaquin River and part south to Tulare Lake. In its natural conditions Tulare Lake covered an area varying from a few square miles in dry cycles to about 700 square miles in wet ones. Reclamation by levies now restricts the submerged area to smaller tracts under normal run-off conditions. South of Kern River Delta a similar shallow but smaller lake stores surplus waters of the Kern River. The area of the lake also has

been restricted by levies which cause excess water to drain north to Tulare Lake through an artificially deepened and levied channel." (emphasis ours)

Bulletin 29, Division of Water Resources, page 75.

In other words, as shown by the above quotation relied upon by respondents, both Tulare Lake and Buena Vista Lake have been artificially restricted by levies and a channel artificially deepened and levied from Buena Vista Lake to Tulare Lake in order to force Kern River flood waters into Tulare Lake, and that these two artificial changes, not a natural flow of the Kern River, caused Kern River waters to drain north to Tulare Lake. We quote these two pertinent facts from the above Bulletin: (1) "levies which cause excess water to drain north to Tulare Lake" and (2) through "an artificially deepened and levied channel".

2. **The Two Documents Cited by Respondents as Showing the Kern River Ever Drained Into the San Joaquin River Do Not Sustain in Any Way, Nor State, the Kern River Ever Flowed Into the San Joaquin.**

Contrary to the statement in the footnote cited at page 32 of respondents' brief, the old documents, namely, California Conservation Committee Report 202 (1912), reprinted 3 Appendix to Journals of California Senate & Assembly, 40th Session (1913), nowhere state that *either the Kern, Tule or Kaweah Rivers, Buena Vista Lake or Tulare Lake ever drained into the San Joaquin River*. At most they state that Tulare Lake overflowed, but they do not state they overflowed into the San Joaquin River even after the artificial changes mentioned in Bulletin 29, *supra*.

3. The Watersheds of the Kern, Tule and Kaweah Rivers Are All Located in Tulare and Kern Counties, Not in Fresno County, as Shown by Respondents' Own Documents.

Even the documents relied upon by respondents—namely, Bulletin 29 of the Division of Water Resources of the State of California—disproves the position of respondents and proves that the watersheds of the Kern, Tule and Kaweah Rivers lie entirely in Kern and Tulare Counties.

The California Legislature before adopting the Central Valley Project or submitting it to the people and prior to adopting the protective statutes for counties and areas of origin under the Central Valley Project, authorized the California Division of Water Resources to determine the location of the watersheds of the various streams in the area. This report given under authority of the Legislature and⁹ relied upon extensively by respondents conclusively shows that the watersheds of Kern, Tule and Kaweah Rivers are distinct from the San Joaquin and lie in Kern and Tulare Counties—not Fresno County.

"The Kern River is the most southerly of the large streams rising in the Sierra Nevada and discharging into the San Joaquin Valley. Its watershed is situated in *Kern and Tulare Counties*." (emphasis ours)

Bulletin 29, Division of Water Resources, page 74.

"The *Kaweah* River drains a watershed on the western slope of the Sierra Nevada in *Tulare County*. * * *

⁹Chapter 832, Statutes of 1929, California Legislature.

"The Tule River drains a small and somewhat rectangular area on the lower western slope of the Sierra Nevada lying south of the Kaweah River Basin, west of the Kern River Basin and north of the Deer Creek Basin. (emphasis ours)

Bulletin 29, Division of Water Resources, pages 73-74.

The documents relied upon by respondents therefore conclusively show that none of the rivers in either Tulare or Kern Counties, in which counties lie the respondent districts served by the Friant-Kern Canal, ever emptied their waters *naturally* in the *course of nature* into the San Joaquin River, but from time immemorial emptied their waters into either Tulare Lake or Buena Vista Lake.

4. **Moreover, Under the Law Watersheds of a Tributary Stream Upstream From Its Junction With a River Is Not the Watershed of the River.**

The authorities are clear that even if we assume that the rivers in Tulare and Kern Counties known as the Tulare, Kaweah and Kern Rivers ever in the course of nature flowed into the San Joaquin or could be considered tributaries of the San Joaquin River, which they did not, nevertheless by the unanimous weight of the authorities the watershed of a tributary are not the watershed of a river above its junction with the river.

"The Ramapo river is a tributary and not a branch (as was suggested in the argument) of the Passaic river. As a tributary it is an independent stream, having its own separate watersheds. * * *. It does not follow as a logical sequence, because of that fact, that these rivers lose their identity as independent streams, and

that thereby their watersheds are those of the Passaic any more than it would follow that the Passaic watersheds were also the watersheds of these rivers emptying into the Passaic river."

Borough of Oakland v. Board of Conservation and Development of New Jersey, 122 A. 311, 313 (1923).⁴⁰

* * * Tributary of river held a watershed different from that of the river, within statute as to obtaining additional water from other watershed, "watershed other than that of the river." (Syllabus)

Borough of Oakland v. Board of Conservation and Development of New Jersey, 122 A. 311 (1923).

"Sec. 82. *Forks of Stream*.—When two streams unite and form a single watercourse, lands above the junction are to be considered riparian only to the particular fork in the watershed of which they are located. The fact that the streams are of different size, or that both lie in one general watershed or drainage basin does not affect the rule; nor is it material that the two watersheds are separated merely by a comparatively low table-land or mesa. * * *"

25 Cal. Jur. 1080-1081.⁴¹

Anaheim Union Water Co. v. Fuller, 150 C. 327, 330, 11 L.R.A. (N.S.) 1062, 88 P. 978 (1907).

⁴⁰It will be remembered that in California and other states where the doctrine of riparian rights is recognized riparian land must meet two requirements. First, it must abut on the stream, and Second, it must be in the watershed of the stream.

5. **The California Supreme Court Has Held That the San Joaquin River Originates in Fresno and Madera Counties.**

If further discussion were needed we point out that the Supreme Court of California has held that the San Joaquin River originates in Fresno and Madera Counties, not in Tulare or Kern Counties.

"* * * The San Joaquin River is a natural water course arising in the Sierra Nevada in Fresno and Madera Counties." (emphasis ours)

Meridian, Ltd. v. San Francisco, 13 C. 2d 424, 429, 90 P. 2d 537, 91 P. 2d 105 (1939).

Moreover, the water involved in this action is all water that originates in the Counties of Fresno and Madera and which passes Friant Dam fifty miles upstream from the junction of Fresno Slough where respondents claim some artificially created flood waters drained from Tulare and Kern Counties into Fresno Slough.

If further proof were needed that the respondent districts served by the Kern Canal are not within the watershed of the San Joaquin and that none of the waters of the Kern, Tule or Kaweah Rivers drain into the San Joaquin, it appears from the decision of the California Water Rights Board interpreting what is meant by the San Joaquin watershed under the California watershed protective statute.¹¹

¹¹Major tributaries draining the Sierras and contributing to the San Joaquin River on its northward journey from Mendota Pool are the Fresno, Merced, Tuolumne, Stanislaus and Calaveras Rivers. Intermittent contributions of minor magnitude are made to the San Joaquin River downstream from Mendota Pool by watercourses draining the easterly slope of the Coast Range plus return irrigation water from areas served by the Delta-Mendota

The above finding of the California Water Rights Board clearly negatives that there is or ever was, a natural channel from the Kern, Tule or Kaweah Rivers to the San Joaquin River and clearly holds that none of the districts taking water from the Friant-Kern Canal are in the watershed of the San Joaquin River. All of the districts took part in this decision and did not appeal therefrom.

6. Irrespective of the Watershed Protective Law and Whether the Tule River and Kaweah Rivers Have Their Own Separate Watersheds, Petitioner Is Still Entitled to Protection Under California's County of Origin Law and the Act of October 14, 1949, 63 Stat. 852-853.

All of the above discussion has to do with California's watershed protective act. Irrespective of this act petitioner City of Fresno and other former plaintiffs are protected by the fact that they are in the county of origin¹² and therefore protected by the California county of origin laws and the Act of October 14, 1949, 63 Stat. 852-853,¹³ irrespective of California's watershed of origin protective statute.

Canal of the United States and by the Merced Irrigation District. "Of primary concern is the watershed area of about 1,633 square miles above the valley floor controlled by Friant Dam. All of this portion of the San Joaquin River watershed is located within Fresno and Madera Counties and is bounded on the north by the watersheds of the Merced and Fresno Rivers and on the south by that of the Kings River."

State of California Water Rights Board Decision D 935.

12* * *. The San Joaquin River is a natural water course arising in the Sierra-Nevada in Fresno and Madera Counties. (emphasis ours)

Meridian, Ltd. v. San Francisco, 13 C. 2d 424, 429, 90 P. 2d 537, 91 P. 2d 105 (1939).

13-BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF

C. Other Erroneous Contentions and Statements of Fact of Respondents' Brief Pointed Out.

1. Respondents' Statement Appearing at Page 11 of Their Brief to the Effect That the Feasibility Report of 1935 Did Not Support the City's Contention Is Incorrect.

The petitioner, City of Fresno, in its opening brief, stated that the Feasibility Report of 1935 stated "no new lands were to be brought into cultivation by the project." Respondents in their brief say that this statement of petitioner, City of Fresno, is incorrect. This statement of respondent districts, however, is incorrect and inaccurate. We quote from the Feasibility Report:

"The Project will not bring into production new agricultural areas." (emphasis ours)

Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935, p. 1, Appendix "D" petitioners' opening brief.

Moreover, even petitioners in their brief do not dispute that the plan provided water for domestic and municipal purposes.

AMERICA IN CONGRESS ASSEMBLED, that the Central Valley Project, California, authorized by section 2 of the Act of Congress of August 26, 1937 (50 Stat. 850), is hereby reauthorized * * *

"Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the USE OF WATER IN ACCORD WITH STATE WATER LAWS, INCLUDING BUT NOT LIMITED TO SUCH LAWS GIVING PRIORITY TO COUNTIES AND AREAS OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (emphasis ours)

Act of October 14, 1949, 63 Stat. 852, 853.

"The Central Valley Project embodies a plan * * * to provide urgently needed water supplies for existing * * * *industrial and municipal* developments in the Sacramento and San Joaquin Valleys and upper San Francisco Bay region * * *" (emphasis ours)

Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935, Appendix "D" petitioners' opening brief.

"The Central Valley basin development * * * includes * * * water * * * for *municipal* and miscellaneous purposes including *cities* * * *." (emphasis ours)

United States v. Gerlach Live Stock Co., 339 U. S. 725, 733, 70 S. Ct. 955, 959, 94 L. Ed. 1231 (1950).

"The object of the plan is to arrest the flow and regulation its seasonal and year to year variations thereby creating salinity control to avoid the gradual encroachment of ocean water, providing an adequate supply * * * for *municipal* and irrigation purposes." (emphasis ours)

Ivanhoe Irrigation District v. McCracken, 357 U. S. 275, 281, 78 S. Ct. 1174, 1179, 2 L. Ed. 2d 1313 (1958).

2. The Implied Contention of Respondents That the Central Valley Project Will "Dry Up the River Below Friant" Is Untrue and Incorrect.

At pages 17 to 20 of respondents' brief the Court of Claims case of *Gerlach Live Stock Co. v. United States*, 111 Ct. Cls. 1, Aff. 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950), is used to infer that the Central Valley Project "will dry up the river below Friant" and that the riparian owners between Friant and Gravelly Ford will not retain their riparian and overlying water rights. This is incorrect as will be shown even from the statements of opposing counsel in this case.

In the first place *Gerlach Live Stock Co. v. United States*, *supra*, dealt only with the taking of rights to the overflow of wild flood waters on uncultivated natural grasslands. These lands are shown on Exhibit II of petitioners' opening brief at page 15 thereof. This map as heretofore stated was prepared by the United States Bureau of Reclamation and used by the District Court in its decision in this case. (*Rank v. (Krug) United States*, 142 F. Supp. 1, 39 (1956).) As shown by that map these lands are many miles downstream from Gravelly Ford Canal and many miles downstream from where the Delta-Mendota Canal will replace the waters taken from the San Joaquin River with substitute waters of the Sacramento River.

That the *Gerlach Case* involves simply the overflow waters of the San Joaquin River¹⁴ on grasslands

¹⁴The *Gerlach Decision*. Logically and geographically the recent *Gerlach* decision of the United States Supreme Court, which affirmed six judgments of the Court of Claims against the United States, should be considered under the preceding heading.

many miles below the lands of the original plaintiffs in this action appears from 38 California Law Review article 572-600, which article is quoted profusely by opposing counsel in their brief on certiorari in companion Case No. 115, October Term of this Court, page 4.

Water formerly used for crops, however, was still to be supplied either by allowing the flow between Friant Dam and Gravelly Ford Canal or replacement of the same.

"the plan as originally adopted and as carried out by the Bureau included replacement of all water * * * formerly used for crops * * *." (emphasis ours)

United States v. Gerlach Live Stock Co., 339 U. S. 725, 740, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

Moreover, the latest decision of the United States Court of Claims shows that the riparian landowners between Friant Dam and Gravelly Ford Canal were to be supplied.

"The plan has been altered in a number of respects since there has been approved by the President * * *.

"9. (a) Defendant's plan, as modified contemplated among other things, that the United States should eventually store and divert to nonriparian use the waters of the San Joaquin River originative above Friant Dam and formerly flowing at or below Gravelly Ford, except for releases from

since it arose out of the use of the overflow of the San Joaquin River on grasslands."

38 California Law Review, p. 600.

Friant which would be for one or more of three purposes: (1) *to satisfy riparian rights between Friant and Gravelly Ford; * * ** (emphasis ours)

Wolfsen v. United States, 162 F. Supp. 403, 411 (1958).

Even former opposing counsel Graham in the United States District Court in his law review article which has been quoted on numerous occasions by opposing counsel in this case admits that the San Joaquin River was not to be dried up.¹⁵

Finally, this same former opposing counsel in the article quoted with approval by opposing counsel now before this Court frankly admits that the Friant to Gravelly Ford water users will be provided for.

"There are approximately 230 small land holdings on the 37-mile reach of the river immediately below Friant Dam and extending to a point slightly below the Gravelly Ford Canal. *It is planned to leave an adequate water supply in the river throughout this area, so that irrigation may be continued upon a basis consistent with reasonable use by all water users.*" (emphasis ours)

38 California Law Review 598.

This fact also clearly appears from the written contracts signed by the United States with many of the riparian landowners between Friant Dam and Gravelly Ford Canal and referred to in the law review article cited by opposing counsel.

"* * *. The United States recognizes that the Contracting Owners have certain rights to the use

¹⁵* * * the operation of Friant Reservoir will not 'dry up' the San Joaquin River."

38 California Law Review 599.

of water from, or influenced by, the River on or in connection with said land, either by appropriation, or by prescription, or as owners of land overlying an underground water supply whether from an underground stream or from percolating water, or as owners of land riparian to the River, or otherwise, and in full satisfaction of said water rights howsoever acquired, claimed, or enjoyed the United States will permit water to pass by or through Friant Dam into the River, which water, together with accretions to the River from all sources whatsoever, will maintain a live stream in the River at the control point hereinafter defined."

Def. Ex. A-48-A

Such contract negotiations negative any authority to take these rights by eminent domain.

"* * *. The fact alleged in the petition that at some time in 1919 the War Department offered to purchase part of this land for the fire control station—perhaps only a few square feet, or a rood, out of a 200-acre tract—when considered in connection with the other facts stated, serves not to prove, but to negative, authorization to make the taking asserted in this suit."

Portsmouth Harbor Land & Hotel Co. v. United States, 260 U. S. 327, 339, 43 S. Ct. 135, 140, 67 L. Ed. 287 (1922).

That the river was *not* to be dried up below Friant Dam also appears from respondent Bureau of Reclamations' representations to Congress.

"There are certain existing rights downstream from Friant which have to be supplied. Including

the riparian rights on the river between Friant Dam and Mendota Pool, water needed for preservation of fish life and waterfowl, and losses from evaporation and seepage in the reservoirs and canals, it has been determined that 150,000 acre-feet of Class I water must be reserved to meet those requirements." (emphasis ours)

R. 2284, *Pltf. Ex. 121, Testimony of U.S.B.R. Engineer Stoner on Hearings before a Subcommittee of the Committee on Public Lands, United States Senate, 80th Congress, 1st Session on S912, page 708, Rep. Tr. 3072.

If any other proof were needed that the Central Valley Project provides water for the riparian landowners between Friant and Gravelly Ford Canal, the admission in the answer of the Bureau of Reclamation officials *alone conclusively* shows that their rights were not to be impaired.

" * * allege the plan of the Central Valley Project, approved by the Congress * * *, as it affects the San Joaquin River between Friant Dam constructed, owned and operated by the United States, and Gravelly Ford, a point approximately thirty seven miles westerly thereof, requires the Bureau of Reclamation to, and it will recognize and respect existing water rights of all riparian owners, including such of the plaintiffs, if any, as are riparian owners on the San Joaquin River between Friant Dam and Gravelly Ford, as they exist under the laws of the State of California and which have not heretofore been acquired or adjusted by the United States. In order to accomplish this purpose, that is to say, to give that*

recognition to those rights which the laws of California require, it is the plan, purpose and intention of the Bureau of Reclamation to release at Friant Dam into the bed of the river a sufficient quantity of water so as to enable said riparian owners between Friant Dam and Gravelly Ford to divert from the stream and to make reasonable beneficial use, by using reasonable methods of diversion and reasonable methods of use and purpose, the waters required for irrigation and domestic use, and in addition thereto to maintain a live stream in the river of not less than five second feet at Gravelly Ford." (emphasis ours)

R. 140, 141. Answer of petitioners to Complaint.

"3. That this Honorable Court determine which lands described in plaintiffs' complaint on file herein have their underground water strata charged and recharged from the San Joaquin River.

"5. That this Honorable Court determine and adjudge that a live stream shall be maintained at all times between Friant Dam and Gravelly Ford on said San Joaquin River, which said live stream shall at no time be required to be in excess of the natural flow of the San Joaquin River if Friant dam were not constructed and in operation, which said live stream shall be for the purpose of supplying the said quantity of water for use upon lands riparian to said San Joaquin River and to supply the underground percolating waters for lands determined to be entitled to a recharge from the San Joaquin River for said underground waters." (emphasis ours)

R. 146, 147. Answer of petitioners to Complaint.

3. **Moreover, the Determination of the Amount of Water Riparian Owners Are Entitled to Between Friant Dam and Gravelly Ford Canal Is a Judicial Determination.**

It having been shown that riparian owners between Friant Dam and Gravelly Ford Canal were to have their riparian rights supplied under the Central Valley Project under the law, it is clear that the determination of the amount of water to which they were entitled under these rights is a judicial and not an administrative determination.

"What is a useful and beneficial purpose, and what is an unreasonable use is a judicial question depending upon the facts in each case. Likewise, what is a reasonable or unreasonable use of water is a judicial question *to be determined in the first instance by the Court.*" (emphasis ours)

Gin S. Chow v. City of Santa Barbara, 217 C. 673, 22 P. 2d 5 (1933).

Finally these landowners are in the county of origin and watershed of origin of the San Joaquin River and are protected by the Act of Congress of October 14, 1949, 63 Stat. 852-853.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, * * *.

"* * * the Secretary of the Interior shall make recommendations for the USE OF WATER IN ACCORD WITH STATE WATER LAWS, INCLUDING BUT NOT LIMITED TO SUCH LAWS GIVING PRIORITY TO THE COUNTIES AND AREA OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (emphasis ours)

Act of October 14, 1949, 63 Stat. 852, 853.

4. **Claim of Respondents That Certain Documents Prepared and Published by the State of California Before the People of the State of California Adopted the Central Valley Project and Prior to Changes Made in the Central Valley Plan by Congress Indicate That Riparian Rights Below Friant Dam Were Not to Be Recognized Is so Erroneous as to Be Unworthy of Comment.**

Opposing counsel at pages 13 through 16 of their brief filed in this case intimate that certain state documents indicate that riparian rights between Friant Dam and Gravelly Ford Canal were to be taken is inaccurate and misleading. Respondents rely upon two documents—Bulletins 25 and 29 of the Division of Water Resources.

However, the plan set forth in these documents was not adopted by the United States Bureau of Reclamation. The State plan provided only for a dam at Friant 250 feet high. The dam finally built as a federal project was 320 feet high and had a storage capacity of 520,000 acre-feet, thereby increasing the amount of water which would be available from storage.

The State plan also contemplated making the San Joaquin River navigable to Mendota by means of dams in the channel of the river, pumping stations and a certain amount of channelization. This plan has been replaced by the Delta-Mendota Canal and Tracy Pumping Station, whereby water is lifted several hundred feet above the delta of the San Joaquin River transported by gravity back to a point just above Mendota Dam where it fills the pool formerly maintained by the San Joaquin River backing up the water fourteen miles upstream from Mendota Dam to a point just below the

Gravelly Ford Canal. Riparian lands between Friant and Gravelly Ford were to be supplied.

"9.(a) Defendant's plan, as modified contemplated among other things, that the United States should eventually store and divert to nonriparian use the waters of the San Joaquin River originating above Friant Dam and formerly flowing at or below Gravelly Ford, except for releases from Friant which would be for one or more of three purposes: (1) *to satisfy riparian rights between Friant and Gravelly Ford*; * * * (emphasis ours)

Wolfsen v. United States, 162 F. Supp. 403, 411 (1958).

As shown in the preceding paragraph the riparian and overlying landowners between Friant Dam and Gravelly Ford were to receive all water to which they were entitled.

(a) *The Powerhouse at Friant.*

This is another immaterial issue. Opposing counsel refers to a powerhouse at Friant as only one powerhouse. This issue is really too immaterial for comment. However, the fact is that there were to be *two* power plants at Friant, one of which was not to be eliminated. The State plan included one at the bottom of the river and one in the bottom of the Madera Canal¹⁶ outlet, which could be used to generate power by discharging the water into the bottom of the Madera Canal or by dumping it into the river when not furnishing water to the Madera Canal.

¹⁶Bulletin 29, State of California Department of Public Works (1931) p. 59.

Suffice it to say that both of these power^o generation plants were eliminated before the original plan of feasibility of 1935 was adopted due to public utility opposition and¹⁷ the cooperation between the State engineer who drew up said bulletins and who without authority from the California Water Project Authority eliminated the power plant feature from California's application. Without going into the merits of public versus private ownership of power sites it may be stated that this engineer had long been spokesman for the private power interest in California and the California Water Project Authority complained publicly that he had amended their application for Water Project Authority funds without their consent so as to eliminate any power generation at Friant Dam. *This appears in many newspaper dispatches of the time. The members of the House Public Lands Committee of Congress announced publicly that members of the California Water Commission had stated to them that Hyatt, who was one of the main originators of Bulletin 29, amended the application for W. P. A. funds by eliminating the power features of Friant Dam without the knowledge of the members of the California Water Authority.

Respondents' statement that Congress did not favor water for the area between Friant Dam and Gravelly Ford is entirely erroneous and unfounded. Respondents

17. * * *. A combination of private utilities, in which Pacific Gas and Electric Company perhaps was the most active participant and principal contributor, successfully opposed the Water and Poyer Act submitted to the California voters by referendum in 1922. The State's Central Valley Project Act became law in 1933 against the strong opposition of the company. In that same year the Act was submitted to the voters by referendum and narrowly sustained despite more open opposition by the company.

at pages 21 through 26 of their brief base their argument upon a request by Richard Boke, California Regional Director of the Bureau of Reclamation and one of the original defendants in this case, for an appropriation from Congress "for water rights \$332,000.00".

THE ANSWER TO THIS CONTENTION OF RESPONDENTS IS THAT CONGRESS NEVER GAVE MR. BOKE ANY MONEY FOR THE ACQUISITION OF WATER RIGHTS AFTER THIS SUIT WAS FILED AND AFTER THE TIME HE MADE HIS REQUEST IN 1948 UNTIL HIS FORCED RETIREMENT FROM THE BUREAU OF RECLAMATION.

This is shown by the Appropriations Acts of Congress. This suit was filed in 1947 to force Mr. Boke, Secretary of the Interior Krug and Commissioner of Reclamation Strauss to obey the Congressional Acts involving the operation of the Central Valley Project and particularly to enforce the provisions of the county of origin and watershed protective statutes.

Due to Boke's refusal to carry out these statutes Congress eliminated the salaries of both Boke and Strauss in an effort to force them out of the Bureau of Reclamation. The history of the efforts of Congress to get rid of Boke and Strauss are set forth at page 19 of our brief in companion case No. 31. Finally and what is more important respondents in the very act which opposing counsel quoted as granting Boke money to take the rights of respondents which it did

not (Interior Department Appropriation Act for 1949, 62 Stat. 4112), the salaries of both Boke and Strauss were eliminated.

FINALLY: AND MORE IMPORTANT, OPPOSING COUNSEL ARE ENTIRELY SILENT REGARDING THE ACT OF OCTOBER 14, 1949, 63 Stat. 852-853, which specifically provided that the respondent Bureau of Reclamation officials were to proceed in their operation of the Central Valley Project in accordance with California county and area of origin statutes.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, that the Central Valley Project, California, authorized by section 2 of the Act of Congress of August 26, 1937 (50 Stat. 850), is hereby *reauthorized* * * *.

"Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the USE OF WATER IN ACCORD WITH STATE WATER LAWS, INCLUDING BUT NOT LIMITED TO SUCH LAWS GIVING PRIORITY TO COUNTIES AND AREAS OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (emphasis ours)

Act of October 14, 1949, 63 Stat. 852, 853.

D. Respondents Failed to Answer City of Fresno's Contention That They Are Entitled to Receive at Least 100,000 Acre-Feet of Water Out of the Central Valley Project at a Rate Not to Exceed \$3.50 Per Acre-Foot.

1. Fresno's Need for 100,000 Acre-Feet of Water Before Water Is Taken Out of the County of Origin and Watershed of the San Joaquin River.

At pages 80 and 81 of petitioner's opening brief in this case, No. 51, October Term, 1962, of this Court, testimony of respondent Bureau of Reclamation officials is set forth showing that Fresno's water supply from the underground is limited to 30,000 acre-feet per year and that it needs a supplemental surface supply from Friant Dam of 100,000 acre-feet. No one so far in this case has disputed this fact. We will therefore not go into this matter again.

The California Water Rights Board has the following to say on the City of Fresno's needs:

"Incontestable evidence supports the contention of both the City and the District as to existing deficiencies in water supply. This deficiency is most graphically illustrated by the severe and sustained drop in ground water levels throughout the Unit in recent years indicating a continuous mining of water stored in the underground water basin comprising the Fresno Ground Water Unit (FID 7). The serious nature of the situation is unquestioned. Obtaining a supply to overcome present deficiencies will not long provide a solution to the problem inasmuch as the deficiencies are increasing at an ever increasing rate as new demands on the supply develop. Eventually new wa-

ter sufficient to meet the present overdraft on the Unit and provide for its ultimate development must be forthcoming if the economy of the area is to flourish."

State of California, Water Rights Board, Decision No. D-935, Adopted June 2, 1950, p. 27.

The District Court also found that the City of Fresno's water supply had reached the critical point.

"Under the evidence the City of Fresno is in pressing present need of an additional supply of water for domestic and municipal purposes; it is *reaching the critical point*," (emphasis ours)

Rank v. (Krug) United States, 142 F. Supp. 1, 184 (1956), R. 22.

Secretary of the Interior, Krug, the original defendant in this case, Richard Boke, and the Commissioner of Reclamation, Michael Strauss, continuously reported to Congress that the counties to the east side of the upper San Joaquin Valley, which included the counties of Madera, Merced, Fresno, Tulare, Kings and Kern, would receive water for industrial, municipal and miscellaneous uses at the rate of 200,000 acre-feet of water from Friant Dam annually.¹⁸

Boke, in spite of his representations to Congress, deliberately attempted to exclude all municipalities from sharing water in these six counties. As a result only two contracts for municipal water were executed: The city of Orange Cove, 1,400 acre-feet annually and Fresno County Water Works District No. 18, 150

¹⁸ "Local municipal, industrial, and miscellaneous uses."

"East side upper San Joaquin Valley—200,000 (ac. ft.)"

acre-feet annually out of an average annual flow of the San Joaquin of 1,751,500 acre-feet annually.¹⁹ It was not until after the City of Fresno had filed suit in this action before the California Water Rights Board and after Krug, Strauss and Boke had been eliminated from the Bureau of Reclamation that certain former great Bureau of Reclamation engineers aided the City of Fresno in obtaining a contract in 1961 for 60,000 acre-feet of surface water from the Central Valley Project at a rate of \$10.00 per acre-foot.

THE CITY OF FRESNO'S CONTRACT, HOWEVER, PROVIDES THAT THE AMOUNT COULD BE INCREASED AND THE PRICE DECREASED IN ACCORDANCE WITH THE FINAL DECISION OF THIS COURT IN THIS CASE.

In accordance with the contracts, in accordance with the representations of the original defendant to Congress that 200,000 acre-feet of municipal, industrial and miscellaneous water was to be allocated to the cities of the six counties of the upper San Joaquin Valley, and in accordance with the testimony of the respondent Bureau of Reclamation officials themselves that the City of Fresno needs 100,000 acre-feet of water, we ask this Court to reverse the lower Court and sustain the decision of the District Court in this case (142 F. Supp. 1 (1956)) and to at least grant the City of Fresno 100,000 acre-feet of water.

For further authorities on the City of Fresno's undoubted right to a municipal water supply before water

¹⁹R. 2281, 2933, Pltf. Ex. 106A.

R. 309, Pltf. Ex. 136, Senate Document No. 113, 81st Congress, 1st Session (1949), p. 108.

is transported out of the county of origin and the watershed of origin see pages 54 to 97 of petitioners' opening brief.

Finally, respondents at page 31 of their brief make an admission which completely destroys any objection to the county of origin legislation where they admit that the county of origin statute could apply to unappropriated water on State applications assigned to the United States and to the water which they might now seek to obtain by eminent domain.²⁰

As heretofore shown at page 108 of our brief in case No. 31 [Pltf. Ex. 440-A, Rep. Tr. 23,831] there are 309,500 acre-feet of surplus water flowing below Friant Dam available for appropriation in addition to the 183,500 acre-feet of water necessary to operate the Court's plan of physical solution, which according to respondents' own admission, the county of origin statute would apply to the California Water Rights Board in its decision No. D-935, June 2, 1959, giving this surplus water to the Bureau of Reclamation "subject to the vested rights of the petitioners."

Likewise the claim of opposing counsel that these watershed and county of origin protective water rights

²⁰"In any event, the county of origin statute could affect only unappropriated water covered by state applications to appropriate assigned to the United States and could not affect water rights acquired by the United States for project purposes by other means, such as purchase, exchange, or the exercise of the power of eminent domain."

had been taken by eminent domain is clearly answered in the opinion of the Attorney General, which was written by one of opposing counsel, as follows:

"The legislative background of the priority makes it difficult to conceive that the Legislature intended that the authority could destroy the priority by condemnation. Since the priority exists only as against the authority, such a construction would completely destroy the effect of Section 11460 and make its enactment an idle gesture."

25 Opinions, Attorney General, p. 21 (1955).

and by the fact that in view of the express prohibition by Congress in the Act of October 14, 1949, 63 Stat. 852, respondent Bureau of Reclamation officials were powerless to take these rights by eminent domain.²¹

Likewise, they attempt to claim that the City of Fresno's percolating water rights are limited to lands owned by the City of Fresno which appears in the footnote of page 7 of their brief is clearly without merit. The claim of the City of Fresno in this case is the claim to overlying percolating water rights which in the State of California are the same as riparian rights. In addition the city owns a 1,500-acre airport largely devoted to crops and trees, a 200-acre park and several

²¹ "The power of eminent domain is vested solely in Congress and the executive has no inherent power in nature of eminent domain." (Syllabus)

"The taking of private property for public use by an officer of the United States, unless authorized, expressly or by necessary implication to do so by some Act of Congress, is no act of Government." (Syllabus)

Youngstown Sheet & Tube Co. v. Sawyer, 103 Fed. Supp. 569, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

thousand acres of parking strips adjoining the city streets lying over the alluvial cone of the San Joaquin. However, the situation of the City of Fresno in regard to percolating water rights is entirely distinct from the cases of *San Bernardino v. Riverside*, 126 Cal. 7 (1921), and *Pasadena v. Alhambra*, 33 Cal. 2d 908 (1949). The City of Fresno by Ordinance 2336 took all of the overlying percolating water rights of the individual landowners in Fresno and has continuously held them since.²² This fact clearly distinguishes the case of *San Bernardino v. Riverside*, *supra*, and *Pasadena v. Alhambra*, *supra*, cited by respondents at pages 7 and 8 of their brief where neither San Bernardino nor Pasadena had taken their right of individual owners to pump from the underground.

In the first place, as found by the California Water Rights Board the respondent districts are now receiving too much water and their contracts may have to be eventually cut down.²³

²²"That from and after August 1, 1937, the drilling and/or drilling of wells within the City of Fresno by private individuals, corporations, copartnerships, associations, public utilities other than municipally owned public utilities * * * for human use and/or consumption be and the same is hereby prohibited."

City of Fresno Ordinance 2336, August 1937.

²³"With the exception of the Madera Irrigation District and Chowchilla Water District which have used only about 66 per cent of their contract allotments, ground water levels have been rising since 1951 more or less steadily in all of the districts receiving water under long-term water delivery contracts with the United States. This rise, coupled with notice of the quantities of water delivered, average probable future contractual deliveries, and acreages irrigated, presents a strong inference that some readjustment downward of contractual quantities may ultimately be not only desirable but necessary to prevent water logging of valuable agricultural lands."

— State of California, State Water Rights Board, Decision No. D-935, Adopted June 2, 1959.

(a) *Section 9(c) of the Act of 1939, 53 Stat. 1187.*

Although we have already shown that there is no shortage of water for irrigation purposes and that the question of the legality of the above act should not therefore be an issue, nevertheless respondents attempt to make it an issue. Therefore, we feel that this Court should declare Section 9(c) of the Act of 1939, (53 Stat. 1187) unconstitutional. The reasons for this are that the *only* rivers in the area from which Fresno can obtain a surface supply are the San Joaquin, the Kings, the Tule, the Kaweah and the Kern. At the present time on each of these rivers, the United States has either completed a dam such as they have on the San Joaquin, Kings and Kern, or are now constructing dams on the other two streams, the Kaweah and the Tule. All of the waters on the Kings, Tule, Kaweah and Kern are being put to beneficial uses under prior rights in counties and watersheds of origin in which *Fresno is not situated*. The City of Fresno is located in the watershed and county of origin of the San Joaquin River only. It cannot take water from the counties of origin or watershed of the other remaining rivers in the San Joaquin Valley by any legal process. *It must obtain its supply from Friant Dam or be destroyed.*

Clearly the right of human beings in the county and watershed of origin to water to sustain their own existence is paramount over the transportation to other counties and watershed for secondary agricultural uses, especially where we now have more than 50,000,000 acres of surplus agricultural land in production according to Secretary Freeman.

It is submitted that under the Fifth Amendment to the Constitution Congress itself has no power to destroy the lives of the citizens of our cities by taking water which they vitally need and using it for secondary agricultural uses.

We feel that the words of former Justice Brandeis of this Court in his dissenting opinion in *United States v. Burleson* are particularly appropriate.

"A law by which certain publishers were unreasonable or arbitrarily denied the low rates would deprive them of liberty or property without due process of law; and it would likewise deny them the equal protection of the laws.

"* * *. It would be going a long way to say that in the management of the post office the people have no definite rights reserved by the First and Fifth Amendments to the Constitution."

United States v. Burleson, 255 U. S. 407, 41 S. Ct. 325, 65 L. Ed. 704 (1921).

"* * * discriminatory legislation may be so arbitrary, injurious or unjustifiable as to be violating of the due process clause in the Fifth Amendment."

16A C. J. S. 587;

Bolling v. Sharpe, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954).

We feel that due to the powerful farm lobby in Congress this section could not be amended and that we must rely on this court as the cities did in their apportionment fight before this court to secure fair representation between urban and rural areas in Congress.

Finally, if Section 9(c) of the act of August 4, 1939, 53 Stat. 1187 is an issue here, we respectfully ask this court, not only in the interest of Fresno, but in the interest of the health and welfare of the citizens of every city in the United States, that it declare the following portion of Section 9(c), act of August 4, 1939, 53 Stat. 1187, unconstitutional:

"No contract relating to municipal water supply
* * * shall be made unless in the judgment of the Secretary it will not impair the efficiency of the project for irrigation purposes."

Act of August 4, 1939, 53 Stat. 1187, 1194.

We feel that the Act of 1939 is also unconstitutional since it violated the comity between the United States and the State of California and is not in accord with the present policy of Congress as illustrated by the Act of July 28, 1954, relating to litigation regarding the Deluz Dam on the Santa Margarita River in California reading as follows:

"Sec. 2. (a) *In the interest of comity between the United States of America and the State of California and consistent with the historic policy of the United States of America of Federal non-interference with State water law, the Secretary of the Navy shall promptly comply with the procedures for the acquisition of appropriative water rights required under the laws of the State of California as soon as he is satisfied, with the advice of the Attorney General of the United States, that such action will not adversely affect the rights of the United States of America under the laws of the State of California.*"

*"Sec. 3. (c) For the purposes of this Act the basis, measure, and limit of all rights of the United States of America pertaining to the use of water shall be the laws of the State of California: * * *"* (emphasis in original)

United States v. Fallbrook Public Utility District, 165 F. Supp. 806, 842 (1958).

2. Since None of the Respondents in Their Petitions for Certiorari Attacked the Finding of the District Court That Any Charge to the City of Fresno in Excess of \$3.50 Per Acre-Foot Was Unreasonable and Illegal, No Attack at This Time Can Be Made on This Part of the Decision of the District Court.

The only question now before this Court is whether the determination of the District Court that any charge for strictly irrigation water (not municipal water) to the City of Fresno in excess of \$3.50 an acre foot was arbitrary, unreasonable and in excess of the statutory authority of the Bureau of Reclamation officials was a judicial decision as held by the District Court, or an administrative decision as held by the Court below. The Court below reversed the decision of the District Court, holding that the question of whether a charge to the City of Fresno for strictly Class I irrigation water in excess of \$3.50 per acre-foot was unreasonable, arbitrary and illegal, was strictly an administrative decision not a judicial decision. None of the respondents in their petition for certiorari attacked that part of the finding of the District Court holding charges for irrigation water to the City in excess of \$3.50 per acre-foot was unreasonable and illegal. They rely entirely upon the holding of the Court below that such a decision was an administrative and not a judicial de-

cision.²⁴ There can therefore now be no attack on the finding of the District Court that any charge to the City of Fresno in excess of \$3.50 per acre-foot was unreasonable and illegal.

We submit that the determination of whether a water rate charged by respondent Bureau of Reclamation officials is unreasonable, arbitrary, illegal or in excess of the authority conferred upon them by Congress is clearly a judicial and not an administrative decision and that the Court below was in error in holding to the contrary.²⁵

24. * * *. It is their administrative function to determine the rates at which water shall be delivered. It cannot be said that their statutory authority is limited to the making of such determinations as the courts may find to be reasonable."

State of California, United States of America v. Rank,
293 F. 2d 340, 352 (1961).

²⁵Unreasonable has been defined as meaning "arbitrary": *Wisconsin Telephone Co. v. Public Service Commission*, 287 N. W. 122, 232 Wis. 274 (1939); *Harris v. State Corporation Commission*, 46 N. M. 352, 129 P. 2d 323 (1942); *State v. Public Commission*, 179 S. W. 2d 132, 238 Mo. 317 (1944); "capricious": *Wisconsin Telephone Co. v. Public Service Commission*, 287 N. W. 122, 232 Wis. 274 (1939); *Harris v. State Corporation Commission*, *supra*; "illegal": *City of Louisville v. Koenig*, 162 S. W. 2d 19, 290 Ky. 562 (1942); "without support in evidence": *Application of Chicago B. & O. R. Co.*, 295 N. W. 389, 138 Neb. 767 (1940); "confiscatory": *Lone Star Gas Co. v. State*, 153 S. W. 2d 681, 137 Tex. 279 (1941); and "irrational": *Harris v. State Corporation Commission*, 46 N. M. 352, 129 P. 2d 323 (1942).

It is for the courts to determine whether a water rate is reasonable or unreasonable, arbitrary, capricious or illegal. This is a judicial not an administrative function.

Sawgart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143 (1912);

Yuma County Water Users' Ass'n. v. Schlecht, 262 U. S. 38, 43 S. Ct. 498, 67 L. Ed. 909 (1922);

Lakes v. Fox, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937).

Magnuder v. Belle Fourche Valley Water Users' Ass'n.,
219 F. 72 (8th Cir.) (1914).

Moreover, we again submit that such a suit is not a suit against the United States.

Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143 (1912);

Yuma County Water Users' Ass'n. v. Schlecht, 262 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909 (1922);

Ickes v. Fox, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937).

* * *. The questions whether or not the charges alleged to be illegal and the acts and threatened acts of executive officers depriving the shareholders of a water users' association of water * * * are justified by law, are questions of law which a court of equity is empowered to determine in a suit of such an association against such executive officers, although the Secretary of the Interior

"12. The public have a right to be exempt from unreasonable exactions * * * (Syllabus)

Smyth v. Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819 (1898).

"The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable. * * *. But that involves an inquiry as to what is reasonable and just for the public. * * *. The public cannot properly be subjected to unreasonable rates * * *."

Cornington & L. Turnpike Co. v. Sanford, 164 U. S. 578, 17 S. Ct. 198, 41 L. Ed. 560, 566 (1896).

Stark v. Wickard, 321 U. S. 288, 64 S. Ct. 559, 88 L. Ed. 733 (1944) (enjoining Secretary of Agriculture from enforcing unreasonable minimum milk prices set by him).

* * * when a case arises in which it becomes necessary to determine whether a properly established rate is a reasonable or constitutional one, either to protect the public against excessive or unreasonable charges, or its constitutional rights * * *, the courts may determine the reasonableness of such rate and may enjoin the enforcement of an unjust, unreasonable, rate." (emphasis ours)

43 Am. Jur. 593, 694.

or other executive officers have already decided them.

"3. United States — 'Suit Against United States' Inference With Rights.

"A suit against executive officers of the United States to enjoin ~~them~~ from committing acts unauthorized by or in violation of law, to the irreparable injury of the property rights of the plaintiff, is not a suit against the United States', nor is it or the injunction south objectionable, either on the ground that they interfere with the property or the possession of the property of the United States. * * *." (emphasis ours)

Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 Fed. 72, 73 (8th Cir.) (1914);

United States v. Lee, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171 (1882);

Ickes v. Fox, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1927).

Neither does the decision of the District Court in this case "direct the disposition of property owned by the United States" as averred by opposing counsel.

It is further submitted that the mere fact that the record title to the reclamation works is in the government or even if we assume that the title to the water is in the government and not in the respondent districts which it is not, the jurisdiction of this Court would not thereby be defeated as stated by this Court:

"* * * But public officials may become tortfeasors by exceeding the limits of their authority.

And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law *or in equity*, he is not relegated to the Court of Claims to recover a money judgment." (emphasis ours)

Land v. Dollar, 330 U. S. 731, 739, 67 S. Ct. 1009, 1012, 91 L. Ed. 1209 (1946).

"Suits to restrain Secretary of Interior from enforcing his predecessor's orders limiting plaintiffs' water right appropriations in unit of federal reclamation project in alleged violation of plaintiffs' contracts with government held not dismissible for nonjoinder of United States as defendant on ground that United States was owner of water rights and relief sought was substantially specific performance of executory contract with government, * * *

* * *

"Exemption of United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded, and in case of injury threatened by his illegal action, officer cannot claim immunity from injunction process."

Ickes v. Fox, 300 U. S. 82, 57 S. Ct. 412, 413, 81 L. Ed. 525 (1937). (Syllabus)

"1. The fact that the legal title to allotable Indian lands is still in the government does not defeat the jurisdiction of a court over a suit to compel the Secretary of the Interior to undo, as wholly unwarranted and unauthorized by law his action in summarily erasing from the approved rolls of citizenship in the Choctaw and Chickashaw Nations the name of one who has received an al-

lotment certificate and is in the possession of the land.” (Syllabus)

◦ *Garfield v. United States, ex rel. Goldsby*, 211 U. S. 249, 262, 29 S. Ct. 62, 66, 53 L. Ed. 168, 174 (1908);

United States v. Lee, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171 (1882);

Ickes v. Fox, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937);

State of Nebraska v. State of Wyoming, 325 U. S. 589, 65 S. Ct. 1332, 89 L. Ed. 1815 (1945).

Finally, title to the water in the Central Valley Project is not in the government but in the landowner subject to prior rights of original plaintiffs.

“* * * that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.”

Act of June 17, 1902, 32 Stat. 388, 390, 43 U. S. C. Sec. 391.

Congress in its legislation regarding the Central Valley Project again reaffirmed the above provision and provided that the water from a reclamation project is appurtenant to the land and therefore owned by those landowners being served from the project.

“* * *. That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.”

Act of July 2, 1956, 70 Stat. 483, 484.

Moreover, this is the holding of this Court.

"Section 8 of the Reclamation Act of June 17, 1902, 43 U. S. C. A. 372-382, provided: * * * that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated. * * *. We can say here what was said in *Ickes v. Fox*, supra, 300 U. S. pages 94 and 95, 57 S. Ct. page 416, 81 L. Ed. 525: 'although the government diverted, stored and distributed the water the contention of petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made not for the use of the government but under the Reclamation Act for the use of the landowners, and by the terms of the law and of the contract already referred to *became the property of the landowners* wholly distinct from the property right of the government in the property right of the government in the irrigation works. Compare *Murphy v. Kerr*, (D. C.) 296 F. 536, 544, 545. The government was and remained simply a carrier and distributor of the water (*Id.*) with the right to receive the sums stipulated in the contract as reimbursement * * *.' (emphasis ours)

State of Nebraska v. State of Wyoming, 325 U. S. 589, 613-614, 65 S. Ct. 1332, 1349, 89 L. Ed. 1815 (1945);

Ickes v. Fox, 300 U. S. 82, 95, 57 S. Ct. 412, 416, 81 L. Ed. 525 (1937).

Additional authorities on this point are to be found at page 104 of our opening brief in this case.

3. The Spurious "Feasibility Report" Contained in House Document 146, 84th Congress, 2nd Session, 1956, (Pltf. Ex. 139) Meant Nothing to Congress.

As we have heretofore stated, no respondent raised the question in their petition for certiorari of whether the findings of the District Court that any charge to the City of Fresno for strictly irrigation water—not municipal water although to be used for municipal purposes—in excess of \$3.50 an acre-foot was unreasonable, arbitrary and illegal (see districts' petition for certiorari, Case No. 966, October Term, 1961, pages 3-4, and Solicitor General's petition for certiorari, Case No. 366, October Term, 1961, page 2). Respondents attempt at page 28 of their brief to justify the charge of respondent Bureau of Reclamation officials of \$10.00 per acre-foot for irrigation water to the City of Fresno by saying that such a charge had been called to the attention of Congress. It is submitted that respondents should not be allowed in accordance with the rules of this Court to present issues not set forth in their petition for certiorari.

"(2) The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari *but the brief may not raise additional questions or change the substance of the questions already presented in those documents.*" (emphasis ours)

Federal Practice and Procedure Rules Ed., Barron and Holtzoff-Wright, Vol. 3A, p. 1539 (1958).

Without waiving our objection that respondents did not mention this point in any petition for certiorari it

may be stated, however, that there is no merit in respondents' argument that Congress had been advised of the \$10.00 charge by House Document 146, 80th Congress, 1st Session (1947); 1 Engle, Central Valley Project Documents (1956), House Document 416, 84th Congress, 2nd Session, 574. This document was an illegal and fraudulent attempt by Secretary of the Interior Krug, Commissioner of Reclamation Strauss and Richard Boke as California Regional Director of the Bureau of Reclamation to illegally make a second feasibility report on the Central Valley Project. As will be observed from page 6 of said document, it purports to be a "feasibility report" on the Central Valley Project, California.

"REPORT ON THE ENGINEERING FEASIBILITY, THE TOTAL ESTIMATED COSTS, AND THE ALLOCATION AND PROBABLE REPAYMENT OF THESE COSTS, OF THE CENTRAL VALLEY PROJECT, CALIFORNIA"

However, it cannot legally be such a feasibility report because *this Court* found that the only feasibility report on the Central Valley Project as required by the Act of December 5, 1924, 43 Stat. 672 at 702, (see Appendix D of our opening brief, page 9) is the feasibility report of December 2, 1935, signed by President Roosevelt.²⁶

²⁶ But it also is true, as pointed out by the claimants, that in these Acts Congress expressly "reauthorized" a project already initiated by President Roosevelt who, on September 10, 1935, made allotment of funds for construction of Friant Dam and canals under the Federal Emergency Relief Appropriation Act, 49 Stat. 115, 118, Section 4, and provided that they "shall be reimbursable in accordance with the reclamation laws." A finding of feasibility, as required by law, was made by the Secretary of the Interior on November 26, 1935, making no reference to

This spurious feasibility report was made by the Secretary of the Interior Krug, Commissioner Strauss and Regional Director Boke in House Document 146 in an abortive attempt to change the fundamentals of the Central Valley Project to a Congress which by this time had lost all confidence in them and which Congress finally terminated the salaries of Boke and Strauss in an effort to force them from Government Service. As shown by the statement of Secretary Krug in 1947 made shortly after this report, Congress had lost confidence in these gentlemen.

• "At the same Salt Lake City Conference (1947) Secretary Krug made the following statements: 'This program is probably closer to my heart than any other in the Department of the Interior and as Mike (Michael Strauss, Commissioner of the Bureau of Reclamation) pointed out to you, for some strange reason *people up in Congress don't trust us like they used to.* * * *'" (emphasis ours)

Investigation of the Bureau of Reclamation, 19th Intermediate Report of the Committee on Expenditures in the Executive Dept., August 7, 1948, House Report No. 2458, pp. 555-556.

The following statement made by the late California Senator Downey, whom the original plaintiffs and the City of Fresno had appealed in their efforts to obtain water, is indicative of the lack of regard of Congress for Secretary of the Interior Krug at the time respond-

navigation, and his recommendation of 'the Central Valley development as a Federal reclamation project' was approved by the President on December 2, 1935."

United States v. Gerlach Live Stock Co., 339 U. S. 725, 731-732, 70 S. Ct. 955, 958-959, 94 L. Ed. 1231 (1950).

ents claim Congress had seriously considered the spurious "Feasibility Report of 1946":

"Senator Downey. Secretary Krug: What part does he play in the Central Valley drama—this tragedy, comedy or farce—however you may wish to describe it? When Mr. Krug was brought to the exalter office he now holds, I thought order would succeed chaos in the Central Valley. Instead, I think with the bard that 'confusion now hath made his masterpiece'."

Investigation, Bureau of Reclamation, Committee on Expenditures, Executive Department, 80th Congress, 2nd Session, page 140.

So far as Mr. Strauss was concerned, the following statement appearing in the congressional investigation of Mr. Strauss is particularly pertinent as showing no credence was given to him on the recommended rates for water.

"Mr. Blanks * * *. Throughout the period of reclamation history, there has been built up the greatest engineering organization the world has known. It is world-renowned. It is something that the people of this country can well be proud of. It is something that all of us have been proud to be connected with. That engineering organization under the present administration of the Bureau of Reclamation has been wrecked, practically wrecked, * * *."

Investigation of the Bureau of Reclamation, Department of the Interior, Executive Department, House of Representatives, 80th Congress, 2nd Session, page 699.

"Referring to Mike Strauss, Chief of the Bureau of Reclamation over Boke: 'Senator Downey: Mike Strauss: Succeeding Bashore, he stepped down from a higher position so that he could enforce his will more directly. As ignorant of engineering, irrigation, and western conditions as any man could be, with no important administrative experience behind his entry into the government service, Mr. Strauss represents the zealot, the politician, the ideologist who lives by the manipulation of propaganda, freely dispatched at public cost; * * *'"

Investigation of the Bureau of Reclamation, Department of the Interior, Executive Department, House of Representatives, 80th Congress, 2nd Session, page 140.

The following finding by the Congressional Committee showed what Congress thought of Mr. Boke.

"* * * your committee has reached the conclusions, based on incontrovertible evidence, Mr. Boke does not possess the qualifications necessary to administer the gigantic Central Valley Project."

Investigation of the Bureau of Reclamation, Department of the Interior, Executive Department, House of Representatives, 80th Congress, 2nd Session, page 10.

This distrust of Congress for Secretary of the Interior Krug, Commissioner of Reclamation Strauss and Regional Director Boke due to their actions in attempting to misrepresent their actions in the Central Valley Project to Congress and their illegal attempts to charge illegal municipal water rates and to deprive petitioner

City of Fresno and others in the watershed and county of origin of the Central Valley Project of water finally resulted in Congress attempting to get rid of these gentlemen by cutting off the salary of at least two of them.

"* * * Pursuant to the Harness Committee report, the Same Congress adopted in the Interior Department Appropriation Act for 1949 the so-called 'Straus-Boke rider.' This act (Public Law 841, 80th Cong.; 62 Stat. 1112) * * *:

"(Provided further, That after January 31, 1949, no part of any appropriation for the Bureau of Reclamation contained in this Act shall be used for the salaries and expenses of a person in any of the following positions in the Bureau of Reclamation, or of any person who performs the duties of any such position, who is not a qualified engineer with at least five years' engineering and administrative experience: (1) Commissioner of Reclamation; (2) Assistant Commissioner of Reclamation; and (3) Regional Director of Reclamation.)"

Central Valley Project Documents, Part 2, Operating Documents, House Document 246, 85th Congress, 1st Session, pages 684, 685.

The congressional statute was applicable to both Boke and Strauss.

"The rider on the 1949 appropriation bill was applicable to both the Commissioner and the Regional Director in California, neither of whom was a professional engineer."

Central Valley Project Documents, Part 2, Operating Documents, House Document 246, 85th Congress, 1st Session, page 685.

Clearly then the question of a fraudulent and illegal so-called Feasibility Report in which a rate of \$10.00 is mentioned for municipal water had little or no effect on the Acts of Congress.

Even if Congress had considered it they never made an effort to amend the Act of August 4, 1939, 53 Stat. 1187, 1194, the Act of June 17, 1902, 32 Stat. 388, nor the Act of July 2, 1956, 70 Stat. 483, 484, which clearly limited water charges to municipalities and upon which acts the District Court made its determination that any charge to the City of Fresno in excess of \$3.50 per acre-foot was unreasonable and illegal.

Moreover, as stated, respondents having failed to meet the issues set forth in the petitions for certiorari filed by the various parties *should not be allowed to raise issues which they did not raise in their petitions for certiorari*, and we therefore submit that clearly the finding of the District Court that any charge in excess of \$3.50 per acre-foot to the City of Fresno was unreasonable, arbitrary and illegal must stand, irrespective of House Document 146.

E. The Rights of Tranquillity Irrigation District.

Respondents now agree there is no argument over Tranquillity Irrigation District as correctly stated by the Court below.²⁷

As this Court stated, the Central Valley Project would replace water of those taken out of water for—

²⁷"1. Also intervening as plaintiff was the Tranquillity Irrigation District. This court is now advised that the dispute between this irrigation district and the Bureau of Reclamation has been resolved by agreement and no longer constitutes an issue upon appeal."

State of California, United States of America v. Rank, 293 F. 2d 340, 342 (1961). (Footnote 1).

merly used for crops.²⁸ For further discussions of the rights of Tranquillity Irrigation District, see pages 51 to 54 of petitioners' brief in companion case No. 51. Respondent Bureau of Reclamation officials recognized their right to substitute all water formerly used by Tranquillity Irrigation District and Tranquillity Irrigation District has accepted the formula of the Bureau as to the method of determining the amount to which they are entitled. So as correctly stated by the Court below, which statement has not been attacked in any petition for certiorari, there is no dispute now between Tranquillity and the United States or any of its officials.

F. The Lower Court Was in Error in Relieving the Respondent Districts From the Injunction. It Was, However, Correct in Not Dismissing Them as Parties.

Most of the respondent districts voluntarily intervened in this action and filed a complaint alleging that

²⁸ * * * the plan as originally adopted and as carried out by the Bureau, included replacement at great expense of all water formerly used for crops and 'controlled grasslands'. * * *." (emphasis ours)

United States v. Gerlach Live Stock Co., 339 U. S. 725, 740, 70 S. Ct. 955, 963, 94 L. Ed. 1231 (1950).

"Delta-Mendota Canal will carry surplus Sacramento River water 120 miles southerly from the Delta to Mendota Pool on the San Joaquin River. Here the water will be used to meet the demand of crop lands now irrigated by diversions from San Joaquin River." (emphasis ours)

R. 326 (New Volume) "Comprehensive Plan for Water Resources Development, Central Valley Basin, California," Harold L. Ickes, Secretary, United States Department of the Interior, Project Report No. 2-4.0-3, November, 1945, page 7.

they were the equitable owners of the water distributed out of Friant Dam.²⁹

In fact the respondent districts were probably the actual owners of the water subject to the prior rights of petitioner City of Fresno and other original plaintiffs.

"Section 8 of the Reclamation Act of June 17, 1902, 43 U. S. C. A., pages 382-392, provided: * * * that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated * * * although the government diverted, stored and distributed the water, the contention of the petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made not for the use of the gov-

²⁹ VII. Allege that by virtue of the terms of said assignments the State of California has become and is the trustor or grantor of an express trust; the United States has become and is the trustee of that trust; the landowners to acquire rights to the use of water from the works of the Central Valley Project, including the landowners of defendant districts, have become and are the beneficiaries of that trust; * * *"

Excerpt from Answer to Plaintiffs' Complaint as Amended of Defendant Districts, Lindsay-Strathmore Irrigation, Lindmore Irrigation District, Ivanhoe Irrigation District, Saucelito Irrigation District, Orange Cove Irrigation District, Tulare Irrigation District, Lower Tule River Irrigation District, Stone Corral Irrigation District, Terra Bella Irrigation District, Porterville Irrigation District, Delano-Earlimart Irrigation District and Exeter Irrigation District, filed 10/16/61, R. 158.

"II. Answering Paragraph IV of said complaint in intervention, these answering defendants admit the allegations therein contained, save and excepting that defendants allege that the assignments therein set forth in Paragraph VII of said Amended Complaint in Intervention."

R. 125. Excerpts from Answer of Southern San Joaquin Municipal Utility District to State of California's Amended Complaint in Intervention, page 2.

ernment but under the Reclamation Act for the use of the landowners and by the terms of the law * * * the water rights became the property of the landowners wholly distinct from the property right of the government in the irrigation works."

State of Nebraska v. State of Wyoming, 325

U. S. 589, 613, 65 S. Ct. 133, 139, 89 L. Ed. 1815 (1945);

Ickes v. Fox, 300 U. S. 82, 95, 57 S. Ct. 412, 416, 81 L. Ed. 525 (1937).

Clearly under Section 379 of the Code of Civil Procedure, State of California, they were properly joined as defendants.

"Who may be joined as Defendants. Any person may be made a defendant who has or claims an interest in the controversy adverse to plaintiff."

California Code of Civil Procedure 379.

One of the claims of the respondent districts is that everyone having an interest in the water of the San Joaquin whether equitable or legal should have been joined in this suit. Had we not joined the respondent districts, they would now here be claiming that they should have been joined. If any further reason be needed that the respondent districts were properly joined as parties, it appears in the fact that they are here before the Supreme Court fighting the claims of the City of Fresno to water at a reasonable rate and still backing, encouraging and abetting the respondent Bureau of Reclamation officials rather than limiting their efforts to get out of this case. We submit that the following authorities clearly apply to this case.

During the trial before the District Court each counsel for each district insisted the districts were proper parties and that each counsel for *each* district had the right to cross-examine *each* of petitioners' witnesses. In one case the districts' counsel cross-examined one of petitioners' witnesses continuously for six weeks [April 10, 1952, to May 22, 1952, Rep. Tr. 3449-5307]. Their cross-examination and introduction in evidence took a majority of the time of the eighteen month long trial before the District Court at great cost to the City.

“Liability for trespass is not dependent upon personal participation, and one who aids, assists, or advises a trespasser in committing a trespass is equally liable with him who does the act complained of.” (Syllabus)

Kirby Lumber Corporation v. Karpel, 233 F. 2d 373 (5th Cir.) (1956).

“31. Co-trespassers—It may be stated as a general rule that all persons who command, instigate, promote, encourage, advise, countenance, co-operate in, aid, or abet the commission of a trespass, or who approve it after it is done, if done for their benefit, are co-trespassers with the person committing the trespass and are liable as principals to the same extent and in the same manner as if they had performed the wrongful act themselves.”

52 Am. Jur. 861.

“33. Persons Authorizing, Encouraging, or Directing Trespass. Any Person who aids, abets, encourages, or authorizes another in the commission of a trespass, even though not personally pres-

ent at its commission, is liable equally with him who commits it."

52 Am. Jur. 862.

"The person authorizing the doing of an act of trespass by another is liable, whether the authorization is express or implied. * * * advises it, encourages, procures, or incites it, or conspires with the actual doer for the doing of it is liable."

87 C. J. S. 987.

The respondent districts therefore are not here asking to get out, but are continuing to assert their rights which they have done in the past at great cost to the petitioner City of Fresno by taking months of the trial and appeal time, with their voluntary appearance, cross-examinations, and introduction into evidence of great volumes of testimony.

For other authorities showing why the Court below should not be reversed in relieving the respondent districts from the effect of the District Court's injunction and showing that the lower Court should be reversed for relieving the districts from the District Court's injunction, we refer to our opening brief in this case, pages 153 to 163 inclusive.

G. The United States Has Waived Its Immunity to Suit in This Action.

We again refer to and incorporated by reference petitioners' argument set forth at pages 116 to 137 of our opening brief, which we submit shows a complete waiver of immunity by the United States under the Act of July 10, 1952, 66 Stat. 518, 560.

VII.

CONCLUSION.

The districts having failed to answer petitioners' argument in lieu thereof have attempted to raise issues which were not raised in any petition for certiorari of any party. As it is impossible to go through 50,000 pages of transcript in the few days left to answer, we do not think raising new points is fair to either this Court or counsel and that these new issues should not be considered under rule 40(d)(2).

The districts also failed to cite any authorities in opposition to the City's contention that determination of the statutory authority of an act of a federal official and the determination of whether rates charged the cities of this Nation for water from reclamation projects (in this case \$3.50 per acre-foot) is unreasonable, arbitrary and in excess of respondent Bureau of Reclamation officials' statutory authority are judicial or administrative determinations.

Finally, it has been shown that the City of Fresno is admittedly in desperate need of water. There are only five rivers in the entire San Joaquin Valley from which this water can possibly come from: The Kern, Kaweah, Tule, Kings and the San Joaquin Rivers. Fresno lies in the county and watershed of only one of these rivers — the San Joaquin. It therefore cannot get water from any other source. It must either get water from Friant or perish. The City should not be deprived of water.

If this Court feels that Section 9(c) of the Act of August 4, 1939, 53 Stat. 787, bars the City of Fresno from obtaining all the water it needs to continue its

very existence, we ask that it rule said Section 9(c) unconstitutional.

We also request this Court to make the rulings which we requested at pages 165 through 169 of our opening brief in this said case No. 51, October Term, 1962, of this Court.

Respectfully submitted,

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CLAUDE L. ROWE,

Attorneys for Petitioner City of Fresno.

Dated: December 31, 1962.

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October Term, 1962

No. 51

CITY OF FRESNO,

Petitioner,

vs.

STATE OF CALIFORNIA, UNITED STATES OF AMERICA,
et al.,

Respondents.

**On Writ of Certiorari to the United States Court of
Appeals for the Ninth Circuit.**

REPLY BRIEF OF PETITIONER.

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IN THE
Supreme Court of the United States

October Term, 1962
No. 51

CITY OF FRESNO,

Petitioner,

vs.

STATE OF CALIFORNIA, UNITED STATES OF AMERICA,
et al.,

Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER.

I.

OPINIONS IN THE COURTS BELOW.

Petitioner in this regard refers to the same opinions as it did at pages 2 to 4 inclusive of its opening brief.

II.

JURISDICTION.

The judgment of the court of appeals was entered on March 31, 1961 [R. 393 (new volume)]. The City of Fresno's timely petition for rehearing was denied on August 14, 1961 [R. 396 (new volume)]. On November 3, 1961, Mr. Justice Douglas extended the time for the City of Fresno to file a petition for a writ

of certiorari to December 12, 1961 [R. 404 (new volume)]. The petition was filed on December 11, 1961, and was granted on April 2, 1962 [R. 405 (new volume)]. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

III.

STATUTES INVOLVED.

1. Act of June 17, 1902, 32 Stat. 388, 389-390, Secs. 4 and 8, 43 U. S. C. 391—See Appendix "C" of Petitioner's Opening Brief, pages 4-5.
2. Act of August 4, 1939, 53 Stat. 1187, 1194—See Appendix "C" of Petitioner's Opening Brief, page 14.
3. Appropriation Act for 1949, 62 Stat. 1112.
(Provided further, That after January 31, 1949, no part of any appropriation for the Bureau of Reclamation contained in this Act shall be used for the salaries and expenses of a person in any of the following positions in the Bureau of Reclamation, or of any person who performs the duties of any such position, who is not a qualified engineer with at least five years' engineering and administrative experience: (1) Commissioner of Reclamation; (2) Assistant Commissioner of Reclamation; and (3) Regional Director of Reclamation.)"
4. Act of October 14, 1949, 63 Stat. 852, 853—See Appendix "C" of Petitioner's Opening Brief, page 16.

5. Sections 2(a) and 3(c) of the Act of July 28, 1954, 68 Stat. 577.

"Sec. 2(s) In the interest of comity between the United States of America and the State of California and consistent with the historic policy of the United States of America of Federal non-interference with State water law, the Secretary of the Navy shall promptly comply with the procedures for the acquisition of appropriative water rights required under the laws of the State of California as soon as he is satisfied, with the advice of the Attorney General of the United States, that such action will not adversely affect the rights of the United States of America under the laws of the State of California.

"Sec. 3.(c) For the purposes of this Act the basis, measure, and limit of all rights of the United States of America pertaining to the use of water shall be the laws of the State of California: Provided, That nothing in this Act shall be construed as a grant or a relinquishment by the United States of America of any of its right to the use of water which it acquired according to the laws of the State of California either as a result of its acquisition of the lands comprising Camp Joseph H. Pendleton and adjoining naval installations, and the rights to the use of water as a part of said acquisition, or through actual use or prescription or both since the date of that acquisition, if any, or to create any legal obligation to store any water in DeLuz Reservoir, to the use of which it has such rights, or to require the division un-

der this Act of water to which it has such rights."

6. Act of July 2, 1956, 70 Stat. 483. 484—See Appendix "C" of Petitioner's Opening Brief, pages 18-19.

IV.

QUESTIONS PRESENTED.

A. Whether respondents have completely failed to answer the following arguments of petitioner, made in petitioner's opening brief, and whether by reason thereof it may be assumed that respondents no longer contest the same:

1. That the determination of the limits of statutory authority of respondent Bureau of Reclamation officials is a judicial and not an administrative determination.

2. That the determination of whether a rate charged for water to a municipality from a Reclamation Project is reasonable or unreasonable, arbitrary and in excess of the statutory authority of respondent officials is a judicial and not an administrative decision.

3. That by virtue of Rule 40(d)(2) of this Court respondent officials may not bring up new matters not set forth in their petitions for certiorari.

4. That having failed to attack as error in their petition for certiorari the finding of the District Court that any charge to the City of Fresno in excess of \$3.50 per acre-foot for Class I irrigation water was unreasonable and illegal, respondents are barred from attacking it under Rule 40(d)(2) of this Court.

5. That respondent officials are required to operate the Central Valley Project in accordance with California county and watershed of origin laws and in accordance with the Act of Congress of October 14, 1949, 63 Stat. 852, 853, requiring respondents to recognize California county and watershed of origin protective laws.

6. That respondent officials are required to operate the Central Valley Project in accordance with California municipal and domestic priority laws.

7. That assuming petitioners were entitled to water from the Central Valley Project the determination of the amount of water to which a riparian overlying owner is entitled is a judicial and not an administrative decision.

B. Whether the District Court was empowered to make a physical solution in this case and if so whether, where all parties including respondent Bureau of Reclamation officials asked the Court to make a physical solution, the present action is a suit against the United States. Whether an action to determine whether charges for water are unreasonable or in excess of the statutory authority of respondents to make is a judicial or administrative decision and if a judicial decision whether such action is a suit against the United States.

C. Assuming respondents can attack the decision of the District Court that any charge to the City of Fresno in excess of \$3.50 per acre-foot for water, *although this point is not included in their petitions for certiorari*, whether respondents can include a profit in said charge in addition to repayment of allocable costs together with the interest charge to municipalities provided for in the Act of August 4, 1939, 53 Stat. 1187.

E. Whether the United States under the Act of July 10, 1952, 66 Stat. 518, has waived its immunity to suit in this case.

F. Whether following provision in Section 9c of the Act of 1939, Stat. is constitutional.

V.

STATEMENT OF THE CASE.

This case, No. 51 this term, involves two other related cases arising out of certiorari from the same decision of the Court below, namely cases No. 31 and No. 115 of this term. We again refer to our Statement of The Case in petitioner's opening brief, page 14 thereof. Petitioners make the same Statement of The Case we made in our opening brief in this case (No. 51, of this term).

Respondents state at page 5 of their answering brief in this case (No. 51, this term) "the present case primarily relates to certain ancillary relief sought by Fresno in connection with its alleged needs for an additional water supply for municipal purposes."¹

¹The present case also involves the riparian rights of landowners between Friant Dam and Gravelly Ford Canal and the overlying rights (which in California are the same as analogous to riparian rights), (*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 C. 2d 489, 45 P. 2d 972 (1935)), supplied by percolation from this area of the river. Respondents in their brief do not deny that the owners between Friant Dam and Gravelly Ford Canal are entitled to all necessary water apparently agreeing with the Court of Claims in *Wolfsen v. United States*, 162 F. Supp. 403 (1958): We quote:

"9. (a) Defendant's plan, as modified contemplated among other things, that the United States should eventually store and divert to nonriparian use the waters of the San Joaquin River originating above Friant Dam and formerly flowing at or below Gravelly Ford, except for releases from Friant which would be for one or more of three purposes:

As shown by exhibits I, II and III of our opening brief, the City of Fresno is located in the upper San Joaquin Valley. The United States has constructed or is in the process of constructing dams on every river in the upper San Joaquin Valley.

The City's sole source of supply for additional water is from Friant Dam.

The City of Fresno admittedly lies in both the county and watershed of origin of the San Joaquin River. Respondent Bureau of Reclamation officials do not contend that any respondent district served by the Friant-Kern Canal is in either the watershed or county of origin of the San Joaquin River.

The City of Fresno owns a municipal water works and pumps its entire supply from the underground. All parties admit that the City cannot safely pump more than 30,000 acre-feet annually from its underground. It is now pumping in excess of 60,000 acre-feet.

The City's engineers testified the City needs at least 150,000 acre-feet surface supply annually from the San Joaquin River. The respondent Bureau of Reclamation officials admit that the City needs at least 100,000 acre-feet annually, in addition to what it can

(1) to satisfy riparian rights between Friant and Gravelly Ford; * * *." (emphasis ours)

Wolfsen v. United States, 162 F. Supp. 403, 411 (1958).

"There are certain existing rights downstream from Friant which have to be supplied. Including the riparian rights on the river between Friant Dam and Mendota Pool, water needed for preservation of fish life and waterfowl and losses from evaporation and seepage in the reservoirs and canals, it has been determined that 150,000 acre-feet of Class I water must be reserved to meet those requirements."

Stoner Hearings before a Subcommittee on Public Lands, United States Senate, 80th Congress, S. 912, p. 708.

pump from the underground, in order to survive.² The respondent officials in 1960, after a protracted hearing before the California Water Rights Commission, contracted to sell the City of Fresno 60,000 acre-feet of Class I irrigation water (not municipal water) at \$10.00 per acre-foot subject to decrease in price and increase in amount in accordance with the final decision in the Courts in this case. Even according to respondent Bureau of Reclamation officials own evidence, the City needs at least 40,000 acre-feet more water annually in order to survive. As shown in petitioner's opening brief, the additional 40,000 acre-feet could be obtained from the difference between actual seepage and estimated seepage from the Friant-Kern Canal.

The District Court held that the City of Fresno was entitled to have its needs supplied before any water was supplied to respondent districts from the Friant-Kern Canal (*Rank v. (Krug) United States*, 142 F. Supp. 1 (1956)).

The District Court also held that any charge for Class I irrigation waters to petitioner City of Fresno in excess of \$3.50 per acre-foot was unreasonable and in excess of the statutory authority of respondent Bureau officials.³ (*Rank v. (Krug) United States*, 142 F. Supp. 1 (1956)). Respondent officials in their petition for certiorari raised no issue on the correctness of this finding of the District Court.

There is no question that the respondent districts are getting more water than they need.⁴

²R. 1983.

³*Rank v. (Krug) United States*, 142 F. Supp. 1, 185 (1956).

⁴With the exception of the Madera Irrigation District and

VI.

ARGUMENT.

A. Respondent Bureau of Reclamation Officials in Their Reply Brief Fail to Answer the Following Contentions of Petitioner.

Petitioner's arguments which respondent Bureau of officials failed to answer are here listed with either a reference to the pages in petitioner's opening brief where authorities supporting said undisputed arguments are found or a brief quotation of authorities in support of said argument of petitioners is given.

1. **The Determination of the Statutory Authority of Respondent Bureau of Reclamation Officials Is a Judicial and Not an Administrative Determination.**

"* * *. The responsibility of determining limits of statutory authority of administrative agencies is a judicial function * * *." (Syllabus)

Stark v. Wickard, 321 U. S. 288, 310, 64 S. Ct. 559, 571, 88 L. Ed. 773 (1944).

Also see page 92 of petitioner's opening brief in Case No. 51, this term.

2. **The Determination of Whether a Rate Charged for Water From a Reclamation Project Is Reasonable or Unreasonable, Arbitrary and in Excess of the Statutory Authority of Respondent Officials Is a Judicial and Not an Administrative Decision.**

It is for the courts to determine whether a water rate charged for water out of a United States Reclamation Project is reasonable or unreasonable, arbitrary, capri-

Chowchilla Water District which have used only about 66 per cent of their contract allotments, ground water levels have been rising since 1951 more or less steadily in all of the districts receiving water under long-term water delivery contracts with the

cious or illegal. This is a judicial, not an administrative function.

"* * *. The responsibility of determining limits of statutory authority of administrative agencies is a judicial function * * *." (Syllabus)

Stark v. Wickard, 321 U. S. 288, 310, 64 S. Ct. 559, 571, 88 L. Ed. 773 (1944);

Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143 (1912);

Yuma County Water Users' Ass'n v. Schlect, 262 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909 (1922);

Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 Fed. 72 (8th Cir.) (1914).

It will be observed in all of the above cases, neither the United States nor the Secretary of the Interior was a party and that all of said actions were for the determination of the question of whether the water charges from a Bureau of Reclamation Project were legal or illegal. Other cases supporting petitioner's position are as follows:

"12. The public have a right to be exempt from unreasonable exactions * * *." (Syllabus)

Smyth v. Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819 (1898).

United States. This rise, coupled with notice of the quantities of water delivered, average probable future contractual deliveries, and acreages irrigated, presents a strong inference that *some readjustment downward of contractual quantities may ultimately be not only desirable but necessary to prevent water logging of valuable agricultural lands.*" (emphasis ours)

State of California, State Water Rights Board, Decision No. D-935, Adopted June 2, 1959, p. 74.

"The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable * * *. But that involves an inquiry as to what is reasonable and just for the public. * * *. The public cannot properly be subjected to unreasonable rates * * *."

Covington & L. Turnpike Co. v. Sanford, 164 U. S. 578, 17 S. Ct. 198, 41 L. Ed. 560, 566 (1896);

Stark v. Wickard, 321 U. S. 288, 64 S. Ct. 559, 88 L. Ed. 773 (1944) (enjoining Secretary of Agriculture from enforcing unreasonable minimum milk prices set by him).

"* * * when a case arises in which it becomes necessary to determine whether a properly established rate is a reasonable or constitutional one, either to protect the public against excessive or unreasonable charges, or its constitutional rights * * *, the courts may determine the reasonableness of such rate and may enjoin the enforcement of an unjust, unreasonable, rate." (emphasis ours)

43 Am. Jur. 693, 694.

3. **By Virtue of Rule 40 (d) (2) of This Court Respondent Officials May Not Bring Up New Matters Not Set Forth in Their Petitions for Certiorari.**

See Rule 40(d)(2) of this Court.

4. **Having Failed to Attack as Error in Their Petition for Certiorari the Finding of the District Court That Any Charge to the City of Fresno in Excess of \$3.50 Per Acre-Foot for Class I Irrigation Water Was Unreasonable, Respondents Are Barred From Attacking It Under Rule 40 (d) (2) of This Court.**

"(2) The phrasing of the questions presented need not be identical with that set forth in the

jurisdictional statement or the petition for certiorari but the brief may not raise additional questions or change the substance of the questions already presented in those documents.” (emphasis ours)

Federal Practice and Procedure Rules Ed., Barron and Holtzoff-Wright, Vol. 3A, page 1439 (1958).

Moreover, the decision of the trial court on this issue should be affirmed unless clearly not sustained by the evidence. We point out just one part of the evidence. Petitioner's engineer, Charles H. Lee, testified that charges should not exceed \$1.50 per acre-foot including interest.⁵

5. That Respondent Officials Are Required to Operate the Central Valley Project in Accordance With California County and Watershed of Origin Laws and by the Act of Congress of October 14, 1949, 63 Stat. 852, 853, Requiring Respondents to Recognize California County and Watershed of Origin Protective Laws.

This is one of the most important questions before this Court. We believe petitioner's position is conclusively sustained by the authorities cited at pages 137 to 151 inclusive of our opening brief in this case, No. 51 this term.⁶

⁵R. 295 (new Volume), Deft. Ex. A-79-A, Rep. Tr. 19,778.

⁶Respondent Bureau officials in Footnote 8 at page 26 of their answering brief in this case attempt to distinguish the Act of October 14, 1949, 63 Stat. 852, 853, by quoting only a limited part of that act and attempt to distinguish the act by saying it was adopted “at the suggestion of the Bureau of Reclamation, *Hearings, American River Basin Project, House Subcommittee on Irrigation and Reclamation*, 81st Cong., 1st Sess.”

However, from the document of the Bureau given the Senate it was clear that the Bureau was referring to “all existing water rights” under the Central Valley Project and that their only

Moreover, the full quotation of the Act of October 14, 1949, 63 Stat. 852, 853, appears at page 16 of Appendix "C" of petitioner's opening brief in this case No. 51 which completely nullifies their contention that this act didn't apply to all features of the project and shows that this act was a complete reauthorization of the Central Valley Project as set forth in the act of August 26, 1937, 50 Stat. 844, 850.

Moreover, neither the Friant-Kern Canal nor the Delta-Mendota Canal were in operation at that time as alleged by respondents.

6. The County of Origin and Watershed of Origin Protective Rights May Not Be Taken by Eminent Domain.

Both the Act of October 14, 1949, 63 Stat. 852, 853, and the following opinion of the Attorney General of California clearly show that water to which California counties and area of origin are entitled may not be taken by eminent domain or condemnation.

"The legislative background of the priority makes it difficult to conceive that the Legislature intended that the authority could destroy the priority by condemnation. Since the priority exists only as against the authority, such a construction would completely

approval was contained in their documentary report to Congress that they had "complied with California's county of origin legislation."

"66. In addition to respecting all existing water rights, the Bureau in this report has complied with California's county of origin legislation, which requires that water shall be reserved for the presently unirrigated lands of the areas in which the water originates, to the end that only surplus waters will be exported elsewhere." (emphasis ours)

Senate Document 113, 81st Congress, page 65, Pltf. Ex. 136, R. 2285, Rep. Tr. 6,570.

destroy the effect of Section 11460 and make its enactment an idle gesture.”

25 Opinions, Attorney General, page 21 (1955).

The efforts of respondent officials to put their plan of physical solution into force by contracts with some of the riparian owners between Friant Dam and Gravelly Ford Canal also negative any authorization by Congress to take these rights.

“* * *. The fact alleged in the petition that at some time in 1919 the War Department *offered to purchase part* of this land for the fire control station—perhaps only a few square feet, or a rood, out of a 200-acre tract—when considered in connection with the other facts stated, serves not to prove, but to negative, authorization to make the taking asserted in this suit.” (emphasis ours).

Portsmouth Harbor Land & Hotel Co. v. United States, 260 U. S. 327, 339, 43 S. Ct. 135, 140, 67 L. Ed. 287 (1922).

For additional authorities showing that county and watershed of origin rights cannot be taken by eminent domain, see pages 139 through 148 inclusive of petitioner’s opening brief in this case No. 51 this term.

7. That Respondent Officials Are Required to Operate the Central Valley Project in Accordance With California Municipal and Domestic Priority Laws.

See pages 54 and 55 of petitioners’ opening brief in this case No. 51 this term.

8. **Assuming That Petitioner Was Entitled to Water From the Central Valley Project the Determination of the Amount of Water to Which a Riparian or Overlying Owner Is Entitled, Is a Judicial and Not an Administrative Decision.**

It having been conclusively shown that both petitioner City of Fresno and the riparian owners between Friant Dam and Gravelly Ford Canal are entitled to have all necessary water reserved for them to supply their present and future needs and that said rights may not be taken by eminent domain, we submit the determination of the amount of water to which their rights entitle them is a judicial and not an administrative decision.

“* * * what is a useful and beneficial purpose, and what is an unreasonable use is a judicial question depending upon the facts in each case. Likewise, what is a reasonable or unreasonable use of water is a judicial question to be determined *in the first instance by the Court.*” (emphasis ours)

Gin S. Chow v. City of Santa Barbara, 217 C. 673, 706, 22 P. 2d 5 (1933).

- B. **The District Court Was Empowered to Make a Physical Solution in This Case.**

We submit that this Court in approving the Court of Claims decision in *Gertach Live Stock Co. v. United States*, 111 Ct. Cls. 1, Aff. 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950) approved court decrees of physical solution on streams of the Central Valley Project, and that it is the duty of appropriators of water such as the United States is in this case to pay for the same.

* * * If * * * one seeks to appropriate the water wasted or not put to any beneficial use, it is *obligatory that he find some physical solution, at his expense*, to preserve existing prior rights
* * *

"It would appear that plaintiffs were not deprived of all of their rights as riparian owners by the amendment to the California Constitution. Apparently, they had the right to demand that defendant provide such a *physical solution* as would permit them to continue to receive so much of the waters of San Joaquin River as they could beneficially use; or, if such a solution was impossible, that they had the right to demand of the defendant compensation for the deprivation of the right to so much of the water they had formerly received as they could beneficially use." (emphasis ours)

Gerlach Live Stock Co. v. United States, 111 Ct. Cls., 1, 81, Aff. 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

Such has also been the holding of the Court below on at least three occasions.⁷

⁷ "The matter of a physical solution becomes a practical problem which will vary with each case. That practical problem is best stated by the question—how can the utmost beneficial use be made of the waters of the particular stream without invading prior vested water rights. If those prior vested water rights can be preserved and satisfied by giving them the water to which they are entitled, and at the same time waste can be prevented by reasonable changes in natural physical characteristics, then, under the California decisions, the court may solve that problem by the use of its injunctive powers, conditioned upon making those physical changes. The parties seeking to make an appropriation or to take water, in derogation of prior vested rights, can be enjoined from taking water until those physical changes are made. The efforts of the courts of California in imposing conditional decrees of injunction requiring a physical solution have

It is further submitted that in view of words "that a physical solution be found" in the Court of Claims case quoted above that the plaintiff "had the right to demand that defendant (here the United States) provide a physical solution"; that either the United States was not an indispensable party as was held in *Rank v. Krug*, 90 F. Supp. 773 (1950), (cited with approval by this Court),⁹ or that as Mr. Justice Douglas and Mr. Justice Black held in their opinion in the *Gerlach Live Stock Company* case, that where the United States,

been to, as near as possible, satisfy the prior vested right whether riparian or *overlying*, and at the same time make available, for appropriation and reasonable and beneficial use elsewhere, all water in excess of that required to satisfy those prior vested rights." (emphasis ours)

State v. Rank, 293 F. 2d 340, 344 (1961);

"9. The term 'physical solution' as used in California water law apparently contemplates a court-enforced plan for making as much water as possible available, through the construction of dams or canals or other physical or mechanical instruments, to all the lawful claimants of the waters in dispute. * * * See: *Peabody v. City of Vallejo*, 1935, 2 Cal. 2d 351, 40 P. 2d 486, 497; *Rancho Santa Margarita v. Vail*, 1938, 11 Cal. 2d 501, 81 P. 2d 533, 562; *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* 1935, 3 Cal. 2d 489, 575, 45 P. 2d 972; *City of Lodi v. East Bay Municipal Utility District* 1936, 7 Cal. 2d 316, 341, 60 P. 2d 439. See also *Rank v. Krug*, D.C.S.C. Cal. 1950, 90 F. Supp. 773, 803."

State of California v. United States District Court, 213 F. 2d 818, 821 (Footnote 9) (9th Cir.) (1954).

"* * *. Perhaps some physical solution by or control under court decree could permit participation by all in the conservation of all flow of the watershed for beneficial use that no drop would waste uselessly into the Pacific."

People of State of California v. United States, 235 F. 2d 647, 662 (9th Cir.) (1956).

"22. United States District Court, Southern District of California rendered a decision on April 12, 1950, in *Rank v. Krug*, 90 F. Supp. 773, consistent with the views we take of the issues here involved."

United States v. Gerlach Live Stock Co., 339 U. S. 725, 754, 70 S. Ct. 955, 970, 94 L. Ed. 1231¹⁰ (1950).

as an appropriator, comes into a state and seeks to appropriate water (as it is doing in this case),⁹ it waives its sovereign immunity under the Basic Reclamation Act of June 17, 1902, 32 Stat. 388, 389-390.¹⁰

Finally, it will be remembered that the Secretary of the Interior himself requested a physical solution.

"The *defendant Bureau* of Reclamation officials filed a plan for a *physical solution* December 15, 1951. This plan is reflective in substantial detail of the principles which I have outlined thus far in this letter. The State of California, as an intervenor in the case, also filed a plan for a physical solution, and the plaintiffs did likewise." (emphasis ours)

R. 298 (new volume), Deft. Ex. A-79-A, Letter of Secretary of the Interior Douglas McKay to Hon. Herbert Brownell, Jr., Attorney General, Rep. Tr. 19,778.

⁹California Water Rights Board Decision No. D 935, adopted June 2, 1959.

¹⁰"Congress to be sure, has full power to relinquish its immunity from suit for the taking. See *Ford & Son v. Little Falls Fibre Co.*, 380 U. S. 369, 377, 50 S. Ct. 140, 141, 74 L. Ed. 483; *United States v. Realty Co.*, 163 U. S. 427, 440, 16 S. Ct. 1120, 1125, 41 L. Ed. 215. And I think *it has done so*—not by the Acts appropriating funds for the project but *by the Reclamation Act of 1902*, 32 Stat. 388, 43 U. S. C. 371 *et seq.* * * *.

"The Act applies solely to the 17 western States. It deals with reclamation projects as its title indicates. The Central Valley Project is such a project." (emphasis ours)

United States v. Gerlach Live Stock Co., 339 U. S. 725, 757, 70 S. Ct. 955, 972, 94 L. Ed. 1231 (1950).

C. A Suit to Enjoin Respondent Bureau of Reclamation Officials From Charging Unreasonable, Illegal and Arbitrary Rates to Municipalities for Central Project Water in Violation of the Acts of Congress Limiting Such Charges Is Not a Suit Against the United States.

The District Court held that the United States although a necessary party to the doing of complete relief in this case was not an indispensable party so far as obtaining relief against the respondent officials was concerned.

"The United States is a *necessary* party to the doing of complete relief, though it would not be an *indispensable* party to the obtaining of relief only against the defendant officials." (emphasis ours)

Rank v. (Krug) United States, 142 F. Supp. 1, 78 (1956).

The Court below partially affirmed this portion of the decision of the District Court, holding that the United States was not an indispensable party so far as the District Court's plan of physical solution was concerned, but was an indispensable party so far as obtaining water by the City was concerned. Neither Respondent officials, nor the court below however, cited one single authority backing this part of the decision of the Court below.

At page 94 of petitioner's opening brief in this action No. 51 (petitioners) cited decisions of this Court involving attempted illegal Bureau of Reclamation charges which held that the determination of whether bureau of reclamation charges contained illegal items is a judicial and not an administrative determination.

At page 98 of their brief, petitioners cited decisions of this Court and other federal Courts that an action to determine whether water rates attempted to be charged by Bureau of Reclamation officials are unreasonable, illegal or arbitrary is not a suit against the United States. We now briefly cite three decisions of this Court involving these two points and one of several decisions of the Court of Appeals holding that such a suit as this is not an action against the United States.

Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143 (1912);

Yuma County Water Users' Assn. v. Schlecht, 262 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909 (1922);

Ickes v. Fox, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937).

* * *. The questions whether or not the charges alleged to be *illegal* and the acts and threatened acts of executive officers depriving the shareholders of a water users' association of water * * * are justified by law, are questions of law which a court of equity is empowered to determine in a suit of such an association against such executive officers, although the Secretary of the Interior or other executive officers have already decided them.

"3. United States — 'Suit Against United States' Interference With Rights.

"A suit against executive officers of the United States to enjoin them, from committing acts unauthorized by or in violation of law, to the irreparable injury of the property rights of the plaintiff, is not a 'suit against the United States', nor

is it or the injunction sought objectionable, either on the ground that they interfere with the property or the possession of the property of the United States. * * *." (emphasis ours)

Magruder v. Belle Fourche Valley Water Users' Ass'n., 219 F. 72, 73 (8th Cir.) (1914).

Swigart v. Baker, *supra*, was a suit for an injunction by a member of an irrigation district which was supplied with water from the Sunnyside unit of the Yakima Irrigation Bureau of Reclamation Project in eastern Washington, against the local officials of the United States Bureau of Reclamation in regard to the reasonableness and legality of certain rates for water the Secretary of the Interior was charging. Neither the Secretary of the Interior nor the United States was a party. The District Court of eastern Washington ruled that this suit was not one against the United States. We quote:

"(2) The respondents claim that this is, in effect, a suit against the government. If the position taken by the complainant is sound, and the respondents, without authority of law, are attempting to deprive him of rights accorded to him by the law, the claim that this is a suit against the government is utterly unfounded."

Baker v. Swigart, 196 F. 569, 571 (1912).

This Court affirmed this judgment of the District Court in the above-entitled case, we quote:

"The decree of the Circuit Court of Appeals is reversed, that of the District Court is affirmed, and the case remanded to the District Court."

Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 648, 57 L. Ed. 1143 (1912).

Yuma County Water Users' Ass'n. v. Schlecht, supra, was a suit for an injunction by owners of tracts of land in the Bureau of Reclamation's Yuma Irrigation Project against "local officials of the Yuma Project of the United States Reclamation Service." (*Yuma County Water Users' Ass'n. v. Schlecht*, 275 F. 885 (9th Cir.) (1921), to determine the legality and reasonableness of water rates under the project. The United States was not a party.

As shown in all of the above suits, the reasonableness and legality of water charges by Bureau of Reclamation officials under Reclamation Projects was decided and in none of the above decisions of this Court was either the United States or the Secretary of a party.

Nowhere in respondents' brief did respondents attempt to distinguish the above cases, nor do we believe they can distinguish them. Other decisions of this Court sustain petitioners.

"* * *. but public officials may become tortfeasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment." (emphasis ours)

Land v. Dollar, 330 U. S. 731, 739, 67 S. Ct. 1009, 1012, 91 L. Ed. 1209 (1946).

"Exemption of United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded, and in case of injury threatened by his illegal action, officer cannot claim immunity from injunction process." (Syllabus)

Ickes v. Fox, 300 U. S. 82, 57 S. Ct. 412, 413, 81 L. Ed. 525 (1937).

1. Respondent Bureau of Reclamation Officials Are Attempting to and Are Illegally Making a Huge Profit From the Operation of the Central Valley Project and From Municipal Water Offered Petitioner City of Fresno, in Violation of the Acts of Congress Authorizing Reclamation Projects in General and the Central Valley Project in Particular.

See pages 105 through 115 of petitioner's opening brief in Case No. 51, this term, which we incorporate by reference herein.

2. Neither Is the Secretary of the Interior an Indispensable Party.

At page 28 of respondent officials' brief, respondents make the claim that the Secretary of the Interior was an indispensable party.

In the first place, under the latest decision of this Court, the question of whether the head of an administration or administrative department residing in Washington is an indispensable party is a matter of *practical consideration*.

"8. Federal Civil Procedure. Section 203. *Indispensability of parties may be determined on practical considerations.*

"9. Declaratory Judgment. Section 304. Where joining Commissioner of Immigration and Naturalization as additional party defendant in alien's action against District Director of Immigration and Naturalization for District of New York *might result in compelling alien to go to District of Columbia in order to contest deportation in his action for declaratory relief*, Commissioner was not an indispensable party. Administrative Procedure

Act, Section 10, 12, 5 U.S.C.A. Section 1101 et seq." (Syllabus) (emphasis ours)

Shaughnessy v. Pedreiro, 349 U. S. 48, 75 S. Ct. 591, 99 L. Ed. 868 (1955).

Here, based on "practical considerations" it would have been unjust and impossible to ask that attorneys for the farmers of moderate means, the attorneys for the fifteen respondent irrigation districts, attorneys for the State of California, the attorneys of the California Farm Bureau and other California cities who came into this case *amicus curiae* and the battery of high powered expert witnesses to go to Washington for a continuous period of eighteen months and attempt to try a case before a Washington judge not familiar with the local terrain and conditions. As this Court said in the case just cited.

In the second place the respondent California Regional Director, Boke, who was in complete charge of the Central Valley Project from 1944 to 1953, admitted that he had full authority to enter into whatever contracts he desired and on whatever terms for water from the Central Valley Project.¹¹

¹¹From the evidence it appears that the dates of the contracts between the United States and the 15 Irrigation District defendants, together with the date of the factual report upon the feasibility of furnishing water to such districts, as well as the initial water delivery date, are as set forth in the following table:

	Contract	Factual Report	1st Del. of water
Delano-Earlimart	8/11/51	June, 1950	3/1/52
Exeter	11/8/50	Jan. 1950	3/23/51
Ivanhoe	9/23/50	Apr. 1949	3/20/50
Lindmore	2/29/49	June 1948	5/19/50
Lindsay-Strathmore	8/5/48	Jan. 1950	7/9/49
Lower Tule	5/1/51	Aug. 1950	3/1/52
Orange Cove	5/20/49	Aug. & Sept. 1947	

Boke who was California Regional Director of the Bureau of Reclamation was in office from 1944 to 1953 when all the respondent district contracts were executed.¹²

Moreover, this point has been decided by this Court where the legality and unreasonableness of water rates was determined against regional officials of the Bureau of Reclamation only.

Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143 (1912);

Yuma County Water Users' Ass'n. v. Schlecht, 262 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909 (1922).

(a) *Respondents Authorities Do Not Sustain
Their Positions.*

Finally the authorities cited by respondents do not sustain their position. At page 28 of respondent's

Porterville	1/28/52	July 1950	3/1/52
Saucelito	2/13/51	June 1950	3/24/51
S.S.J.M.U.D.	10/18/45	Feb. & Mar. 1948	
Stone Corral	12/13/50	Jan. 1959	3/27/51
Terra Bella	10/12/50	Jan. 1950	4/13/51
Tulare	10/18/50	Feb. 1949	3/19/51
Chowchilla	7/5/50	Mar. 1950	3/22/51
Madera	5/14/51	Mar. 1950	3/1/52

Rank v. (Krug) United States, 142 F. Supp. 1, 137.

¹²By Mr. Rowe: Q: You remember having lunch in Washington, on April 17, with Mr. Winton, sitting in the back of the room, and Mr. Earl Harris of Santa Cruz, do you not?

"A: Certainly.

"Q: You made a statement at that time that you could do whatever you wanted in California, as far as contracting for water, setting up flows and releasing water from a dam, didn't you?

"A: That is generally my responsibility, yes.

"Q: Yes, without appealing to any higher authority?

"A: Generally speaking, yes." (emphasis ours)

Testimony of Witness Richard L. Boke, Rep. Tr. August 21, 1951, pp. 559, 600.

brief in this case (No. 51, this term) respondents cite *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 69 S. Ct. 968, 93 L. Ed. 1231 (1948) and *Williams v. Fanning*, 332 U. S. 490, 68 S. Ct. 188, 92 L. Ed. 45 (1947). In the *Hynes* case the defendant was the regional director of fish and game in Alaska and in *Fanning v. Williams* the defendant was the local postmaster in Los Angeles. In neither case were their Washington superiors of the parties nor the United States parties.

D. The United States Under the Act of July 10, 1952, 66 Stat. 518, Has Waived Its Immunity to Suit in This Action.

Although we submit that a suit to enjoin regional officials of the United States Bureau of Reclamation is not a suit against the United States neither is the Secretary of the Interior an indispensable party to such a suit.

Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143 (1912);

Yuma County Water Users' Ass'n. v. Schlecht, 262 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909 (1922).

Swigart v. Baker, supra, was a suit for an injunction by a member of an irrigation district which was supplied with water from the Sunnyside unit of the Yakima Irrigation Bureau of Reclamation Project in eastern Washington, against the local officials of the United States Bureau of Reclamation in regard to the reasonableness and legality of certain rates for water the Secretary of the Interior was charging. Neither the Secretary of the Interior nor the United States

was a party. The District Court of eastern Washington ruled that this suit was not one against the United States. We quote:

"(2) The respondents claim that this is, in effect, a suit against the government. If the position taken by the complainant is sound, and the respondents, without authority of law, are attempting to deprive him of rights accorded to him by the law, the claim that this is a suit against the government is utterly unfounded."

Baker v. Swigart, 196 F. 569, 571 (1912).

This Court affirmed this judgment of the District Court in the above-entitled case, we quote:

"The decree of the Circuit Court of Appeals is reversed, that of the District Court is affirmed, and the case remanded to the District Court."

Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 648, 57 L. Ed. 1143 (1912).

Yuma County Water Users' Ass'n v. Schlecht, *supra*, was a suit for an injunction by owners of tracts of land in the Bureau of Reclamation's Yuma Irrigation Project against "local officials of the Yuma Project of the United States Reclamation Service" (*Yuma County Water Users' Ass'n v. Schlecht*, 275 F. 885 (9th Cir.) (1921), to determine the legality and reasonableness of water rates under the project. The United States was not a party.

"* * * The questions whether or not the charges alleged to be *illegal* and the acts and threatened acts of executive officers depriving the shareholders of a water users' association of water * * *

are justified by law, are questions of law which a court of equity is empowered to determine in a suit of such an association against such executive officers, although the Secretary of the Interior or other executive officers have already decided them.

“3. United States — ‘Suit Against United States’ Interference With Rights.

“A suit against executive officers of the United States to enjoin them from committing acts unauthorized by or in violation of law, to the irreparable injury of the property rights of the plaintiff, is *not* a ‘suit against the United States’, nor is it or the injunction sought objectionable, either on the ground that they interfere with the property or the possession of the property of the United States, * * *.” (emphasis ours)

Magruder v. Belle Fourche Valley Water Users’ Ass’n, 219 F. 72, 73 (8th Cir.) (1914).

Magruder was the local manager of the United States Bureau of Reclamation.

And although we feel that we have shown that the government has waived its immunity under the Act of June 17, 1902, 32 Stat. 388, 390 (See Appendix “C” page 6 of petitioner’s opening brief in case No. 51), where the government either in a suit for damages or injunctive relief, enters a state and seeks to appropriate water, we submit that immunity of the United States was completely waived in this suit by the Act of July 10, 1952, 66 Stat. 516, 560 (See Appendix “C” page 17 of petitioner’s opening brief in this case No. 51).

At page 2 of respondents' opening brief they refer to the Act of July 10, 1952, 66 Stat. 516 and say one of the questions presented is:

"1. Whether Congress by consent to the joinder of United States in suits for general adjudication of all rights in a river system waived its sovereign immunity * * * for an order enjoining the operation of a federal reclamation project."

Respondent Bureau Officials' Brief in Case No. 51, page 2.

In the first place respondents have added two words to the statutory language of the Act of July 10, 1952, 66 Stat. 500, namely the words "all" and "general" to their questions presented in an effort to imply the Act of July 10, 1952, requires a "general" adjudication of "all" rights, which it does not. The Act of July 10, 1952, refers to the "adjudication of rights to use of water of a river system *or other source*"—not to the "*general*" adjudication of "*all*" rights.

They also overlook the words "or other source" which can here be water from Friant Dam, none of which was to go below Gravelly Ford, and finally they completely ignore the second paragraph of section 208(a) of said Act which reads as follows:

"Sec. 208.(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit."

Act of July 10, 1952, 66 Stat. 516, 560.

Here the United States is acquiring water rights by "appropriation",¹³ by "purchase",¹⁴ and "exchange".¹⁵

The major question presented by respondents in the above question (1) is whether the waiver of immunity under the Act of July 10, 1952, applied to injunction suits. It clearly does since the act applies to "any suit" which would cover both injunction and class action suits, and since the act clearly states the United States "shall be subject to the judgments, orders and decrees of the Court having jurisdiction * * * in the same manner and to the same extent as a private individual under like circumstances". Clearly an individual interfering with the original plaintiffs' rights would be subject to an "injunction". Likewise under the act the respondent Bureau of Reclamation officials or the government itself would be subject to an injunction.

Moreover, a study of the history of the Legislative Act of July 10, 1952, shows the Department of the Interior, in a letter asked the Congressional Committee to except *injunction* suits from the act.¹⁶ Congress

¹³See City of Fresno Complaint in Intervention [R. 182-16] and Decision of California Water Rights Board No. D-935, adopted June 2, 1959, granting the United States rights to appropriate water of the San Joaquin River.

¹⁴Deft. Ex. A-48-A, Purchase Contract dated July 27, 1939.

¹⁵Deft. Ex. A-48-A, Exchange Contract dated July 27, 1939.

¹⁶"(c) *it should not extend to the granting of equitable relief against the United States or to the entering of a judgment for costs against it; (d) the United States should not in any way be prejudiced in the adjudication by the existence of a prior decree granted in any adjudication to which it was not lawfully made a party.*"

Letter to Senator McCarron dated August 3, 1951, from Department of the Interior opposing S. 18, Page 8, Senate Report 755 dated September 17, 1951, 82nd Congress.

turned down this request as shown by the Act of July 2, 1952, 66 Stat. 560.

As stated "or other source" clearly covers Friant Dam with its three outlets — one to the Madera Canal — one to the Friant-Kern Canal and one into the river bed of the San Joaquin where the water from this other source was to flow down to Gravelly Ford Canal and then stop.

In the present case the United States has been added as a party, the respondent Bureau of Reclamation officials were added as parties, all fifteen respondent irrigation districts were parties and the plaintiffs represented in a class action (which clearly is included in the word "any" action) the 47 other riparian landowners who had not settled with the government (not the smaller number stated by respondents) between Friant and Gravelly Ford Canal who had not sold their rights to the United States Bureau of Reclamation — which rights were represented by the respondent officials and their able counsel. We request this Court to look at Deft. Ex. A-9-A-1, R. 2340, Rep. Tr. 13, 361. [As shown in our opening brief the Court below found that certain of the named plaintiffs had certain infinitesimal prescriptive and appropriative rights which the Deputy Attorney General said were "minimal" (See letter from Deputy Attorney General set forth as footnote 130 at page 126 of petitioner's opening brief in this case, No. 51 this term).]

De minimis is defined by Webster's New International Dictionary as follows:

"de minimis * * * Law. The law takes no account of trifles; — a maxim applicable to cases

where it is impracticable for the law to adjust the rights of parties according to trifling changes or difficulties, as in case of alluvion in the change of a stream's banks, or parts of a day in the ordinary reckoning of time, etc."

Since these rights were therefore trifles and impossible for the Court to consider, this was not ground for reversal.

This Court has many times held that a trial court should not be reversed for immaterial or infinitesimal errors or for immaterial errors.

"No judgment should be reversed in a court of error, when it is clear that the error could not have prejudiced and did not prejudice the rights of the party against whom the ruling was not made."

Lancaster v. Collins, 115 U. S. 222; 6 S. Ct. 33, 29 L. Ed. 373 (1885).

"We do not reverse cases for unsubstantial error. Abstract inerrancy is hardly possible in a trial * * * it is never essential to a valid trial."

Maryland Casualty Co. v. Reid, 76 F. 2d 30 (5th Cir.) (1935);

Anchor Casualty Co. v. McGowan, 168 F. 2d 323 (1948).

The District Court made a ruling on the water rights of each of the 217 parcels (See pages 130 through 134 inclusive of our opening brief in this case No. 51 this term).

1. The Court Below Also Erroneously Held That the Rights of the Named Plaintiffs and the Class They Represent Have Not Been Established as Between Themselves.

The Court below stated the following:

“* * *, neither the relief prayed for nor the decree includes the establishment of the rights of the claimants as between themselves.”

State of California, United States of America v. Rank, 293 F. 2d 340, 347-348 (1961).

Although it is submitted that in a class action it is not necessary in the decision to state the rights of the various members of the class as between themselves¹⁷—that being left for a separate proceeding—the District Court did however determine the rights of the claimants between themselves. The Court as shown by Finding 19, R. 768, 769 and Judgment 23 [R. 837] divided the waters of the San Joaquin River between Friant Dam and Gravelly Ford in accordance with the number of acres of each of the parties of particular crops growing on said acres and in accordance with an allowance for use of water for each acre of crop growing on said lands of the plaintiffs and their class.

The District Court therefore did determine the right to use of water as among themselves when it divides the waters between the owners in accordance with the

¹⁷There is no question but that the amount recoverable by each possible claimant is different, both as to the basic figure of percentage of profit denied them and also as to amount of gasoline sold. This factor is not decisive of a class action.

Weeks v. Bareco Oil Co., 125 F. 2d 84, 91 (1941).

number of acres of particular crops growing on the lands of said owners.¹⁸

In fact the Court went so far as to divide the domestic use of water between the plaintiffs and the class they represent based upon the number of human beings located on each parcel of land.¹⁹

¹⁸Finding 23. The court finds that the past, present and future use of the following amounts of water for (1) consumptive use, (2) crop irrigation requirements, (3) farm delivery requirements, (4) effective precipitations, and (5) irrigation efficiency %, within the boundaries of the lands set forth and described in Exhibit 3 hereof (The Lee Line), excepting the lands within Tranquillity Irrigation District, is a beneficial use for agricultural purposes of the water of said San Joaquin River by surface diversion or by pumping underground percolating waters from wells lying within the boundaries of Exhibit 3 of these findings (The Lee Line):

Crop	Consumptive use	Effective Precipitation Acre feet	Crop Irrigation requirement per acre	Farm Delivery requirement	Irrigation efficiency %
"Alfalfa	3.42	0.38	3.04	4.05	75
Irrigated pasture	3.75	0.38	3.37	5.20	65
Cotton	2.38	0.38	2.00	2.85	70
Irrigated hay and grain	1.22	0.38	0.84	1.10	75
Truck	2.30	0.38	1.92	2.85	65
Misc. field crops	1.60	0.38	1.22	1.75	70
Deciduous fruit	2.38	0.38	2.00	2.65	75
Citrus & Olives	2.11	0.38	1.73	2.30	75
Grapes	2.53	0.38	2.15	3.10	70
Rice				6.00	
				to 7.1	

Pre-irrigation by the application of water to land prior to planting is a beneficial use for these crops in addition to the amounts set forth herein."

R. 837, Judgment 23,

¹⁹The Court further finds that any use of water by humans for drinking, bathing, household, household garden uses and for evaporative and refrigerated air conditioning and other domestic uses and for manufacturing and other municipal uses up to an annual average of 339 gallons per person per day, and the use of water without unnecessary waste for drinking or bathing by poultry, cattle and other animals is a beneficial use of either the sur

The Court further decreed the amount of water which could legally be used by Tranquillity Irrigation District, the City of Fresno and other owners of percolating water rights on the alluvial cone of the San Joaquin (Lee's Line, Exhibit II). In fact any parcel of land on the alluvial cone of the San Joaquin known as "Lee's Line." [R. 838-839.] Therefore, it is submitted that the Court below clearly was in error in its above ruling.

2. **Even if We Consider This Suit to Involve the Whole San Joaquin River System From Its Source to Its Junction With the Sacramento and That There Must Be a General Adjudication of All These Rights as Claimed by Respondents, This Case Meets All Requirements of a Waiver of Immunity Under the Act of July 10, 1952, 66 Stat. 516, 560.**

Even if we agree with the erroneous contention of respondents that the word "general" should be added just before the words "adjudication of rights to the use of water of a river system or other source" in the Act of July 10, 1952, this Court should still find the United States has waived its immunity since there has been such a general adjudication.

Petitioner City of Fresno in its complaint in intervention had asked for an adjudication in the District Court of the priority of petitioner City of Fresno's filings to appropriate water of the San Joaquin River over those of the United States [R. 182-1] (*Rank v. (Krug) United States*, 142 F. Supp. 1, 121 (1956)).

face waters of the San Joaquin River or of the underground percolating waters within the Lee Line as more particularly described in Exhibit 3 of these findings."

R. 775, Finding 26.

The District Court held that the State Administrative Agency must first pass on that and allowed them to do so. This agency, then the State Engineer, is now the California Water Rights Board.

After general advertising as required by Section 1300 to 1316 of the California Water Code and Section 712, Article 11 of the California Administrative Code by the California Water Rights Board, all parties to this action including the City of Fresno, the United States and every respondent irrigation district appeared before the State Water Rights Board. The State Water Rights Board in its opinion No. D-935, dated June 2, 1959, denied the application of the City of Fresno to appropriate water and granted those of the United States with certain reservations but made the whole decision subject to final decision *in this case*. Although by statute the United States could petition the California courts for a review of this decision (Sec. 1094.5 California Code of Civil Procedure; the *Temescal Case*, 44 C. 2d 90, 280 P. 2d 1 (1955)), it did not do so. The City of Fresno petitioned for a review but dismissed its application with prejudice. We submit then that the matter of the waiver of immunity of the United States and the jurisdiction of this Court over the United States is *res adjudicata* as against all parties. (*Goodspeed v. Great Western Power Co.*, 33 C. A. 2d 245.)

If there are any other owners of water rights or other parties who should be brought into this case—if any there be—they could easily be ordered brought into this case by this Court at this time. It would be extremely unfair and unjust after the huge expenditure of time and money in this case to dismiss this suit

against the United States and possibly start over again. As was stated by the Supreme Court in *Mullaney v. Anderson*:

“* * *. To dismiss the present petition and require the * * * plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration * * *.”

Mullaney v. Anderson, 342 U. S. 415, 417, 72 S. Ct. 428, 430, 96 L. Ed. 458 (1952).

“* * *. Rule 21 of F. R. C. P. 28 U. S. C. A. authorizes the addition of parties ‘by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.’” (emphasis ours)

Mullaney v. Anderson, 342 U. S. 415, 417, 72 S. Ct. 428, 430, 96 L. Ed. 458 (1952).

Even though there are no other parties to join in this general adjudication if opposing counsel can state what other parties could be joined we submit we are entitled to join them.

3. Respondents' Authorities Distinguished.

Respondents quote and the Court below in support of its ruling that the United States has not waived its immunity to suit, quotes *Miller v. Jennings*, 243 F. 2d 157, 159 (5th Cir.) (1957), a decision with a dissenting opinion.

The above case is clearly distinguishable by the fact that only three irrigation districts were involved in that action and in which action the United States was a party—and of these one district, the largest, the Ele-

phant Butts Irrigation District, lying upstream from the other two districts, *was completely left out of the suit*, and all interested parties and every parcel of land were not represented as here nor was there any such proceeding after advertisement as we had before the Water Rights Board here. Moreover, the State of Texas was not a party to the suit as was the State of California in this case, which entered this suit stating "the state appears in its sovereign, governmental and proprietary capacities, in its own interest and for the protection of its own rights; also as *parens patriae*, in the interest of and for the protection of all its citizens, residents, land owners and water users and its agencies"²⁰ and asked a physical solution of the rights of all parties and of all its citizens and land owners.

Ogden River Water Users Association v. Weber Basin Conservation, 238 F. 936, cited by respondents is clearly distinguishable. In that case the Court was entirely unaware of the Act of July 10, 1952 waiving immunity of the United States—there was only one plaintiff on the entire stream involved and the following quotation from that case sustains our position.

"However, if it appears from the allegations of the complaint, excluding conclusions of law and unwarranted inferences of fact, that the officer named as defendant is acting *beyond his delegated power* or if the authority purporting to confer power on him to act is unconstitutional or otherwise invalid then the action will lie. *The officer is not then*

²⁰R. 88, State of California's Amended Complaint in Intervention.

validly performing the will of his sovereign. (emphasis ours)

Ogden River Water Users' Ass'n v. Weber Basin W. Cons., 238 F. 2d 936, 941.

Here we specifically point out that the respondents are illegally attempting to add a profit in their attempted charge to the City of Fresno in violation of the Act of Congress of August 4, 1939, 53 Stat. 1187, which expressly excludes any profit in charges to municipalities.

Neither is *Hudspeth County Conser. District No. 1 v. Robbins*, 213 F. 2d 425, in point. There was no general adjudication as here and the Act of July 10, 1952, 66 Stat. 516, was not involved.

E. Section 9(c) of the Act of August 4, 1939, 53 Stat. 1187, Should Be Declared Unconstitutional.

Although we have already shown that there is no shortage of water for irrigation purposes and that the question of the legality of the above act should not therefore be an issue nevertheless respondents attempt to make it an issue.²¹ Therefore, we feel that this

²¹"With the exception of the Madera Irrigation District and Chowchilla Water District which have used only about 55 per cent of their contract allotments, ground water levels have been rising since 1951 more or less steadily in all of the districts receiving water under long-term water delivery contracts with the United States. This rise, coupled with notice of the quantities of water delivered, average probable future contractual deliveries, and acreages irrigated, presents a strong inference that some readjustment downward of contractual quantities may ultimately be not only desirable but necessary to prevent water logging of valuable agricultural lands."

State of California Water Rights Board Decision No. D-935, Adopted June 2, 1959, p. 24.

Court should declare the following portion of Section 9(c) of the Act of 1939, (53 Stat. 1187) unconstitutional.

"* * *. *No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.*"
(emphasis ours)

The reasons for this are that the *only* rivers in the area from which Fresno can obtain a surface supply are the San Joaquin, the Kings, the Tule, the Kaweah and the Kern. At the present time on each of these rivers, the United States has either completed a dam such as they have on the San Joaquin, Kings and Kern, or are now constructing dams on the other two streams, the Kaweah and the Tule. All of the waters on the Kings, Tule, Kaweah and Kern are being put to beneficial uses under prior rights *in counties and watersheds of origin in which Fresno is not situated*. The City of Fresno is located in the watershed and county of origin of the San Joaquin River only. It cannot take water from the counties of origin or watershed of the other remaining rivers in the San Joaquin Valley by any legal process. *It must obtain its supply from Friant Dam or be destroyed.*

Clearly the right of human beings in the county and watershed of origin to water to sustain their own existence is paramount over the transportation to other counties and watershed for secondary agricultural uses,

especially where we now have more than 50,000,000 acres of surplus agricultural land in production according to Secretary Freeman.

It is submitted that under the Fifth Amendment to the Constitution Congress itself has no power to destroy the lives of the citizens of our cities by taking water which they vitally need for secondary agricultural uses.

We feel that the words of former Justice Brandeis of this Court in his dissenting opinion in *U. S. v. Burleson* are particularly appropriate.

"A law by which certain publishers were unreasonable or arbitrarily denied the low rates would deprive them of liberty or property without due process of law; and it would likewise deny them the equal protection of the laws.

"* * *. It would be going a long way to say that in the management of the post office the people have no definite rights reserved by the First and Fifth Amendments to the Constitution."

United States v. Burleson, 255 U. S. 407, 41 S. Ct. 352, 65 L. Ed. 704 (1921).

"* * * discriminatory legislation may be so arbitrary, injurious or unjustifiable as to be violating of the due process clause in the Fifth Amendment."

16A C. J. S. 587;

Bolling v. Sharpe, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954).

F. The Spurious "Feasibility Report" Contained in House Document 146, 84th Congress, 2nd Session, 1956 [Pltf. Ex. 139], Meant Nothing to Congress.

Respondents attempt of their brief to justify the charge of respondent Bureau of Reclamation officials of \$10.00 per acre-foot for irrigation water to the City of Fresno by saying that the attention of Congress to such a charge had been called. It is submitted that respondents should not be allowed in accordance with the rules of this Court to present issues not set forth in their petition for certiorari.

"(2) The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari *but the brief may not raise additional questions or change the substance of the questions already presented in those documents.*" (emphasis ours)

Federal Practice and Procedure Rules Ed., Barron and Holtzoff-Wright, Vol. 3A, page 1539 (1958).

Without waiving our objection that respondents did not mention this point in any petition for certiorari it may be stated, however, that there is no merit in respondents' argument that Congress had been influenced by the \$10.00 charge mentioned in House Document 146, 80th Congress, 1st Session (1947); 1 Engle, Central Valley Project Documents (1956), House Document 418, 84th Congress, 2nd Session, 574. This document was an illegal attempt by Secretary of the Interior Krug, Commissioner of Reclamation Strauss and Rich-

ard Boke as California Regional Director of the Bureau of Reclamation to illegally make a second feasibility report on the Central Valley Project. As will be observed from page 6 of said document, it purports to be a "feasibility report" on the Central Valley Project, California.

"REPORT ON THE ENGINEERING FEASIBILITY, THE TOTAL ESTIMATED COSTS AND THE ALLOCATION AND PROBABLE REPAYMENT OF THESE COSTS, OF THE CENTRAL VALLEY PROJECT, CALIFORNIA"

However, it cannot legally be such a feasibility report because this Court in a decision rendered after Document 146 found that the only feasibility report on the Central Valley Project as required by the Act of December 5, 1924, 43 Stat. 672 at 702 (see Appendix D of our opening brief, page 9) is the feasibility report of December 2, 1935, signed by President Roosevelt.²²

This spurious feasibility report was made by the Secretary of the Interior Krug, Commissioner Strauss and Regional Director Boke in House Document 146 in an

²² "But it also is true, as pointed out by the claimants, that in these Acts Congress expressly 'reauthorized' a project already initiated by President Roosevelt who, on September 10, 1935, made allotment of funds for construction of Friant Dam and canals under the Federal Emergency Relief Appropriation Act, 49 Stat. 115, 118, Section 4, and provided that they 'shall be reimbursable in accordance with the reclamation laws.' A finding of feasibility, as required by law, was made by the Secretary of the Interior on November 26, 1935, making no reference to navigation, and his recommendation of 'the Central Valley development as a Federal reclamation project' was approved by the President on December 2, 1935."

United States v. Gerlach Live Stock Co., 339 U. S. 725, 731-732, 70 S. Ct. 955, 958-959, 94 L. Ed. 1231 (1950).

abortive attempt to change the fundamentals of the Central Valley Project to a Congress at which by this time had lost all confidence in them and which Congress finally terminated the salaries of Boke and Strauss in an effort to force them from Government Service. As shown by the statement of Secretary Krug in 1947 made shortly after this report, Congress had lost confidence in these gentlemen.

"At the same Salt Lake City Conference (1947) Secretary Krug made the following statements: 'This program is probably closer to my heart than any other in the Department of the Interior and as Mike (Michael Strauss, Commissioner of the Bureau of Reclamation) pointed out to you, for some strange reason *people up in Congress don't trust us like they used to.* * * *.'" (emphasis ours)

Investigation of the Bureau of Reclamation,
19th Intermediate Report of the Committee
on Expenditures in the Executive Dept., Au-
gust 7, 1948, House Report No. 2458, pp.
555-556.

We are not attempting to criticize Boke, Strauss or Krug personally. They no doubt were all fine men but they were not qualified to hold their jobs. Congress had lost all confidence in any of them or their reports and when this so called feasibility report was issued, Congress attempted to remove them from office so that the City of Fresno and others could get fair treatment under the Central Valley Project and what is more important as shown by the fact that Congress did not amend the Act of August 4, 1939, 53 Stat. 1187, Congress rejected the efforts of these gentlemen to illegally add a profit to

the authorized charges to municipalities providing for repayment of costs together with an interest charge not to exceed three per cent.

The following statement made by the late California Senator Downey, to whom the original plaintiffs and the City of Fresno had appealed in their efforts to obtain water, is indicative of the lack of regard of Congress for Secretary of the Interior Krug at the time respondents claim Congress had seriously considered the spurious "Feasibility Report of 1946":

"Senator Downey. Secretary Krug: What part does he play in the Central Valley drama—this tragedy, comedy or farce—however you may wish to describe it? When Mr. Krug was brought to the exalter office he now holds, I thought order would succeed chaos in the Central Valley. Instead, I think with the bard that 'confusion now hath made his masterpiece'."

Investigation, Bureau of Reclamation, Committee on Expenditures, Executive Department, 80th Congress, 2nd Session, page 140.

So far as Mr. Strauss was concerned, the following statement appearing in the Congressional investigation of Mr. Strauss is particularly pertinent as showing no credence was given to him on the recommended rates for water.

"Mr. Blanks * * *. Throughout the period of reclamation history, there has been built up the greatest engineering organization the world has known. It is world-renowned. It is something that the people of this country can well be proud of. It is something that all of us have been proud to be connected with. That engineering organization

under the present administration of the Bureau of Reclamation has been wrecked, practically wrecked,

* * *

Investigation of the Bureau of Reclamation, Department of the Interior, Executive Department, House of Representatives, 80th Congress, 2nd Session, page 699.

"Referring to Mike Strauss, Chief of the Bureau of Reclamation over Boke: 'Senator Downey: Mike Strauss: Succeeding Bashore, he stepped down from a higher position so that he could enforce his will more directly. As ignorant of engineering, irrigation, and western conditions as any man could be, with no important administrative experience behind his entry into the government service, Mr. Strauss represents the zealot, the politician, the ideologist who lives by the manipulation of propaganda, freely dispatched at public cost;

* * *

Investigation of the Bureau of Reclamation, Department of the Interior, Executive Department, House of Representatives, 80th Congress, 2nd Session, page 140.

The following finding by the Congressional Committee showed what Congress thought of Mr. Boke.

"* * * your committee has reached the conclusions, based on incontrovertible evidence, Mr. Boke does not possess the qualifications necessary to administer the gigantic Central Valley Project."

Investigation of the Bureau of Reclamation, Department of the Interior, Executive Department, House of Representatives, 80th Congress, 2nd Session, page 10.

This distrust of Congress for Secretary of the Interior Krug, Commissioner of Reclamation Strauss and Regional Director Boke due to their actions in attempting to misrepresent their actions in the Central Valley Project to Congress, and their illegal attempts to charge illegal municipal water rates and to deprive petitioner City of Fresno and others in the watershed and county of origin of the Central Valley Project of water finally resulted in Congress attempting to get rid of these gentlemen by cutting off the salary of at least two of them.

"* * * Pursuant to the Harness Committee report, the Same Congress adopted in the Interior Department Appropriation Act for 1949 the so-called 'Strauss-Boke Rider.' This act (Public Law 841, 80th Cong.; 62 Stat. 1112) * * *:

"(Provided further, that after January 31, 1949, no part of any appropriation for the Bureau of Reclamation contained in this Act shall be used for the salaries and expenses of a person in any of the following positions in the Bureau of Reclamation, or of any person who performs the duties of any such position, who is not a qualified engineer with at least five years' engineering and administrative experience: (1) Commissioner and Reclamation; (2) Assistant Commissioner of Reclamation; and (3) Regional Director of Reclamation.)"

Central Valley Project Documents, Part 2, Operating Documents, House Document 246, 85th Congress, 1st Session, pages 684, 685.

The congressional statute was applicable to both Boke and Strauss.

"The rider on the 1949 appropriation bill was applicable to both the Commissioner and the Re-

gional Director in California, neither of whom was a professional engineer."

Central Valley Project Documents, Part 2, Operating Documents, House Document 146, 85th Congress, 1st Session, page 685.

Clearly then the question of a fraudulent and illegal socalled Feasibility Report in which a rate of \$10.00 is mentioned for municipal water had little or no effect on the Acts of Congress.

Even if Congress had considered it they never made any effort to amend the Act of August 4, 1939, 53 Stat. 1187, 1194, the Act of June 17, 1902, 32 Stat. 388, nor the Act of July 2, 1956, 70 Stat. 483, 484, which clearly limited water charges to municipalities to repayment of cost plus interest not to exceed 3% and upon which acts the District Court made its determination that any charge to the City of Fresno in excess of \$3.50 per acre-feet was unreasonable and illegal.

Moreover, as stated, respondents having failed to meet the issues set forth in the petitions for certiorari filed by the various parties *should not be allowed to raise issues which they did not raise in their petitions for certiorari*, and we therefore submit that clearly the finding of the District Court that any charge in excess of \$3.50 per acre-foot to the City of Fresno was unreasonable, arbitrary and illegal and in excess of the statutory authority of respondent must stand, irrespective of House Document 146.

VII.
CONCLUSION.

It is again submitted that the maintenance of this suit is to protect the very life and existence of the City of Fresno, the riparian owners between Friant Dam and Gravelly Ford Canal and the underground percolation water supply of 100,000 acres of valuable land, the majority of which lies in the county producing the greatest volume of agricultural products in the world, and that this Court has said no apology need be made for this litigation involving the Central Valley Project of California.

"* * *. There have at times been differences, but these are inevitable in the every day implementation of such a giant undertaking."

Ivanhoe Irrigation District v. McCracken, 357 U. S. 275, 279-280, 78 S. Ct. 1174, 1178, 2 L. Ed. 2d 1313 (1958).

As to the relief sought we pray as follows:

That this Court reverse the Court below in the matters in which the Court below reversed the District Court in its decisions in *Rank v. (Krug) United States*, 142 F. Supp. 1 (1956) and affirm the decision of the District Court in its entirety in that case; or if this is too broad a prayer we ask this Court to:

1. Affirm the decision of the Court below in all particulars in which it did not reverse the District Court in *Rank v. (Krug) United States*, 142 F. Supp. 1 (1956).

2. Reverse the Court below on the following points:

- (a) Reverse the holding of the Court below that respondent Bureau of Reclamation officials can

take the riparian and percolating water rights of the landowners between Friant and Gravelly Ford Canal, said reversal to be on the ground that Congress has never authorized a taking of these rights.

(b) Reverse the holding of the Court below that respondent Bureau officials can take either by eminent domain or condemnation the overlying percolating water rights of petitioner City of Fresno, said reversal to be on the ground that Congress has never authorized such taking.

(c) Reverse the holding of the Court below that the determination of the statutory limits of authority of respondent Bureau officials is an administrative and not a judicial determination.

(d) Reverse the holding of the Court below that the determination of whether the charge for water to the City of Fresno out of the Central Valley Project is reasonable or unreasonable, arbitrary, capricious or in excess of their statutory authority is an administrative and not a judicial decision.

(e) Reverse the holding of the Court below that the determination of whether rates charged for water by respondent Bureau officials to the City of Fresno in excess of \$3.50 per acre-foot (Class I irrigation water) is unreasonable, arbitrary, capricious and in excess of the authority of respondent Bureau officials is an administrative and not a judicial determination and that such a determination is a suit against the United States.

(f) Reverse the holding of the Court below that the City of Fresno is not entitled as a matter of judicial determination to purchase necessary water

out of the Central Valley Project at rates which are not unreasonable, arbitrary, capricious or in excess of the statutory authority of respondent officials to the extent of the needs of the City of Fresno.

(g) Reverse the holding of the Court below that respondent districts should be relieved of the injunction the District Court imposed on the districts and respondent Bureau officials and sustain the holding of the Court below refusing to dismiss the respondent districts as parties herein.

(h) Reverse the holding of the Court below that the United States has not waived its immunity to suit in this action under the Act of July 10, 1952, 66 Stat. 516, and the Reclamation Act of June 17, 1902, 32 Stat. 388, and other actions of government officials.

(i) Specifically hold that respondent Bureau officials are not authorized by Congress to add a profit to water rates charged cities under reclamation projects in addition to repayment of a proportionate share of construction costs and operation and maintenance costs plus interest at not to exceed $3\frac{1}{2}$ per cent.

(j) Affirm the decision of the District Court in *Rank v. (Krug) United States*, 142 F. Supp. 1 (1956), that any charge to the City of Fresno for water out of the Central Valley Project which has no municipal or domestic priority such as has been offered to the City of Fresno at rates greater than Class 1 irrigation rates (\$3.50 per acre-foot) is unreasonable since no point on designation on

points on appeal was made by any respondent and since no point was raised by any respondent on this point in any petition for certiorari in this Court.

(k) Reverse the Court below and specifically affirm the decision of the District Court in *Rank v. (Krug) United States*, 142 F. Supp. 1 (1956), that the City of Fresno is entitled as a matter of right (in accordance with the California watershed and county of origin statutes and the California domestic and municipal priority statutes which the Respondent officials are required to carry out by virtue of the basic reclamation law of 1902 and the various acts of Congress governing the Central Valley Project which provide that the project and particularly Friant Dam shall supply the domestic and municipal water needs of the City of Fresno) to water out of the Central Valley Project sufficient to supply its needs.

In closing we particularly ask that this Court rule (1) that the City of Fresno is entitled to at least 100,000 acre-feet of water out of the Central Valley Project being the amount the petitioners' engineers testified was the minimum needs of the City of Fresno (which amount would now be 40,000 acre-feet in addition to the 60,000 acre-feet contracted to be sold by the Bureau of Reclamation to the City of Fresno at the close of trial of the above-entitled case); (2) that this Court affirm the decision of the District Court and overrule the Court below and decree the price the City should pay for water should not exceed \$3.50 per acre-foot; and (3) hold that the owners of riparian and overlying percolating water rights between Friant Dam and Gra-

vely Ford may not have their rights taken by either eminent domain or condemnation on the grounds that they be in the Watershed and County of origin of the San Joaquin River, that Congress prohibited the taking of these rights and that at no time did petitioners intend to take these rights by eminent domain.

Respectfully submitted,

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Dated: December 31, 1962.